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No. ________

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In the Supreme Court of the United States

PAUL JUNG, M.D., *ET AL.*

Petitioners,

v.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit's decision in this case conflicts with this Court's precedents on important federal questions of statutory interpretation and separation of powers by holding that the qualified antitrust exemption recently enacted in Section 207(b) of the Pension Funding Equity Act of 2004, 15 U.S.C. § 37b, extinguishes the petitioners' claim that employers of medical residents conspire to fix, depress, standardize and stabilize wages nationwide in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1?

2. Whether all federal district and circuit courts should apply the same standard for dismissing complaints *with prejudice*, specifically the standard established by this Court in *Foman v. Davis*, 371 U.S. 178, 182 (1962), or whether courts in the D.C. and Ninth Circuits may apply a conflicting standard that permits rejecting amended complaints that would be allowed in all other circuits?

3. Whether all federal district and circuit courts should apply the same standard for post-judgment leave to amend a complaint where it has been dismissed *on the pleadings*, specifically the standard established by this Court in *Foman*, 317 U.S. at 182, or whether courts in the D.C., Seventh, Eighth, and Ninth Circuits may apply a conflicting standard that permits rejecting amended complaints that would be allowed in all other circuits?

LIST OF PARTIES

Petitioners Paul Jung, M.D.; Denise Greene, M.D.; and Luis Llerena, M.D. were the plaintiffs in the district court and the appellants in the Court of Appeals.

Respondents were defendants in the district court and the appellees in the Court of Appeals, and consist of Association of American Medical Colleges; National Resident Matching Program; American Medical Association; Accreditation Council for Graduate Medical Education; Medstar-Georgetown Hospital; The George Washington University; Medstar Health, Inc.; Administrators of the Tulane Educational Fund; Barnes-Jewish Hospital; Baylor College of Medicine; Beth Israel Deaconess Medical Center, Inc.; Beth Israel Medical Center; Boston Medical Center Corp.; Cedars-Sinai Medical Center; The Cleveland Clinic Foundation; Duke University Health System, Inc.; Emory University; Henry Ford Health System; The Massachusetts General Hospital; The McGaw Medical Center of Northwestern University; The Mount Sinai School of Medicine of the City University of New York; The New York and Presbyterian Hospital; Rhode Island Hospital; Rush-Presbyterian-St. Luke's Medical Center; St. Louis University; Stanford Hospital and Clinics; Strong Memorial Hospital of the University of Rochester; Thomas Jefferson University Hospital, Inc.; University Hospitals of Cleveland, Inc.; William Beaumont Hospital; and Yale-New Haven Hospital, Inc.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Paul Jung, M.D.; Denise Greene, M.D.; and Luis Llerena, M.D. ("Resident Physicians" or "Residents"), respectfully request a writ of certiorari.

OPINIONS BELOW

Petitioners request review of the D.C. Circuit's decision entered on June 1, 2006 ("Order", Appendix 1-8), unpublished but reported at 2006 WL 1582667 and 2006-1 Trade Cases ¶ 75,275. The Order affirms decisions of the District Court for the District of Columbia entered on August 12, 2004 (App. 9-43, "*Jung II*") and January 25, 2005 (App. 44-49, "*Jung III*"), which are reported at 226 F.R.D. 7 and 338 F. Supp. 2d 26. A prior and inconsistent decision by the district court was entered on February 11, 2004 (App. 50-155, "*Jung I*"), and is reported at 300 F. Supp. 2d 119.

JURISDICTION

The Resident Physicians timely filed petitions for rehearing or rehearing *en banc* on June 30, 2006. Those petitions were denied on July 25, 2006 (App. 156-58). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1 of the Sherman Act ("Section 1"), 15 U.S.C. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal."

Section 207(b) of the Pension Funding Equity Act of 2004 ("Match legislation"), 15 U.S.C. § 37b, enacted subsequent to the filing of this action, provides in pertinent part: "(2) Confirmation of Antitrust Status—It shall not be unlawful under the antitrust laws to sponsor, conduct or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct or participate in such a program [("substantive provision")]. Evidence of any of the conduct described in the preceding sentence shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws [("evidentiary provision")]. (3) Applicability—Nothing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs [("savings clause")]."

STATEMENT OF THE CASE

The D.C. Circuit affirmed dismissal of the Residents' single-count antitrust complaint based on the Match legislation, but that decision conflicts with this Court's precedents on important federal questions of statutory interpretation and separation of powers. "[T]he statute [is] the only sure expression of the will of Congress," *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267 (2004) (Scalia, J., concurring), and the statute reflects an intent to *preserve*, not extinguish, the precise claim asserted here alleging an agreement to fix resident physicians' wages. The courts below may have believed that Congress took aim at this lawsuit but missed, and needed extra help in hitting its target. But as expressed in the statute, the will of Congress is to protect the practice by which employers collectively assign potential residents to a single job and refuse to compete for that resident ("Match") *only so long as it does not further an agreement to fix wages*, a matter that cannot be decided at the pleadings stage. For the time being it must be accepted as true, as the Residents allege, that the Match helps demonstrate wage-fixing and thus their claim falls within the scope of the savings clause. This interpretation is not unreasonable and does not make the Match legislation pointless. Congress considers the Match important enough to warrant relief from less serious antitrust claims that would apply, such as horizontal market division and monopolization, but not important enough to warrant relief from the ultimate and most egregious antitrust violation of price-fixing.

Setting aside whether the Residents' complaint should have been dismissed on the basis of the Match legislation, it certainly should not have been dismissed *with prejudice* because the Residents can clearly plead an alternative claim with no reference to the Match whatsoever. *See* proposed Amended Complaint (App. 164-237). Indeed, the Residents' complaint would *not* have been dismissed with prejudice in any circuit other than the D.C. or Ninth circuits because an amended complaint would have satisfied Federal Rule of Civil Procedure ("Rule") 15(a). This Court and the majority of Circuits hold that it is an abuse of discretion to dismiss with prejudice where an amended claim would meet the Rule 15(a) standard. The D.C. and Ninth Circuits, however, hold that *regardless* of Rule 15(a) issues it is not an abuse of discretion to dismiss with prejudice where *any amended factual allegations would be "inconsistent" with those originally pleaded.* Here, the Residents' original complaint alleged that employers unlawfully agree to fix wages, and that this agreement may be inferred from economic evidence of parallel wages and conduct, and evidence of "plus factors" tending to exclude the possibility of independent action. Those plus factors include, but far exceed, participation in the Match. The Residents' proposed amended complaint alleged the same unlawful agreement based on all of the plus factors originally alleged *except the Match*. Even if this Court soon rules that it is necessary to plead details regarding evidence from which a Section 1 agreement may be inferred, *see Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir.), *cert. granted* 126 S. Ct. 2965 (2005), the Residents' proposed amended complaint here pleaded such detail. But for the D.C. Circuit this was not enough; it affirmed dismissal *with prejudice* on the sole basis that any amended complaint omitting the Match plus factor would be improperly "inconsistent" with the original complaint. It declined to review Rule 15(a) issues at all. Requiring "consistency" in amended pleadings conflicts with the view of this Court and with the majority of Circuit Courts, warranting certiorari.

A similar split of authority among the Circuits exists on another frequently-arising and often-dispositive procedural issue: the standard for post-judgment leave to replead the complaint where it was dismissed *on the pleadings*. The standard established by this Court and followed in the majority of Circuits is that it is an abuse of discretion to deny leave where a new complaint would satisfy Rule 15(a). The D.C., Seventh, Eighth and Ninth Circuits, however, hold that the pleader must first satisfy the "more stringent standard" of Rule 59(e). That ignores, however, that the Rule 59(e) policies of protecting finality of judgment and termination of proceedings do not apply with equal force to judgments *on the pleadings*. Here, the D.C. Circuit did not reach the Rule 15(a) issues that would have been determinative in other Circuits and in this Court. Instead, it ruled that the high standard of Rule 59(e) was not met because the Residents' *post*-judgment motion to amend could have been filed *pre*-judgment.

The Residents filed suit in May 2002 alleging that their subsistence-level wages and dangerously long work hours result from an unlawful agreement among employers and trade associations to depress, standardize and stabilize wages and working conditions in violation of Section 1 of the Sherman Act. As plus factors, the Residents alleged in detail the parallel nature of wages and historic wage patterns, participation by employers in wage information exchanges, compliance by employers with certain anticompetitive residency program accreditation standards and activities, and participation in the Match. In February 2004, the district court largely denied defendants' broadside of motions to dismiss, leaving intact the complaint as to thirty defendants. *See Jung I*, App. 50-155, particularly 133-39 and 142-46.

The defendant employers and associations responded by lobbying Congress for a special antitrust exemption for the Match. They argued that the Match is essential to medical training and has no impact on wages (which they still maintain publicly today). Accepting the idea of immunity for lesser antitrust violations, but *not* immunity for any role in wage-fixing, Congress enacted compromise legislation: the Match would be protected from antitrust claims short of wage-fixing (such as horizontal market division and monopolization, both of which are supported by underlying facts but not pleaded here by the Residents), but the employers and associations would be held to their word: the exemption *would not apply if it were shown that the Match furthered wage-fixing*. Importantly, the Match legislation did not address anything other than the Match, and had no bearing on allegations in the Residents' complaint regarding parallel wages, the information exchanges, or suspect accreditation activities.

The defendants moved to dismiss the complaint and for judgment on the pleadings shortly after the Match legislation was enacted, and the district court granted their motion almost immediately after the parties completed briefing. *See Jung II*, App. 9-43. The court rejected the

Residents' arguments that the complaint adequately pleaded a Section 1 claim even without its Match allegations because of its extensive allegations of plus factors beyond the Match (App. 23-26); that the savings clause preserved wage-fixing claims such as that asserted here (App. 26-27); and that the statute would be unconstitutional in several respects if applied as the defendants urged (App. 27-39). Moreover, without explanation the district court entered final judgment immediately (App. 43), effectively dismissing the Residents' complaint and entire action *with prejudice*.

Complying with the rules of the D.C. Circuit, the Residents timely moved under Rule 59(e) to alter or amend judgment and under Rule 15(a) for leave to file an amended complaint. The Residents attached a proposed Amended Complaint that clearly stated a wage-fixing claim without any reliance on the Match. App. 164-237. The district court denied the motions shortly after the parties completed briefing. *See Jung III*, App. 44-49. It stated that the stringent standard of Rule 59(e) was not met on the sole basis that the Residents had waited until after dismissal to move to amend. App. 46-47. In *dicta*, it commented that it would deny the Rule 15(a) motion anyway for futility because *Jung I* relied in part on Match allegations and the amended complaint omitted those allegations. App. 47-49. The district court did not explain why it considered the Match plus factor essential to stating a Section 1 claim, nor why the Residents failed to state such a claim based on the allegations within the four-corners of their proposed Amended Complaint. The district court also did not explain why a simple motion to dismiss put the Residents between the Scylla and Charybdis of either conceding the motion to dismiss and amending without any test of the new statute, or opposing the motion at the risk of losing their entire action and any ability to assert an amended, non-Match claim.

The D.C. Circuit affirmed the district court's rulings in a short decision (App. 1-8), and then denied the Residents' request for rehearing and rehearing *en banc* (App. 156-58).

The D.C. Circuit's decision conflicts with this Court's precedents on important federal questions of statutory interpretation and separation of powers, applies a standard for dismissal with prejudice that is contrary to that of this Court and all Circuit Courts other than the Ninth Circuit, and applies a standard for post-judgment leave to amend after dismissal on the pleadings that is contrary to that of this Court and all Circuit Courts other than the Seventh, Eighth and Ninth Circuits.

REASONS FOR GRANTING THE PETITION

A. The D.C. Circuit's Decision Conflicts With This Court's Decisions On Important Questions Of Statutory Interpretation And Separation Of Powers.

The only fair reading of the Match legislation's savings clause, 15 U.S.C. § 37b(b)(3), is that it preserves claims alleging unlawful agreements to fix wages:

> Nothing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs.

Likewise, the only fair reading of the Residents' complaint is that it alleges precisely such a claim. As the district court itself concluded at the end of its lengthy analysis in *Jung I*, App. 50-155 at 150-51:

> Finally, the Court finds that plaintiffs adequately have alleged a common agreement to displace competition in the recruitment, hiring, employment and compensation of residents physicians and to impose a scheme of restraints that has the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment . . . .

The gravamen of the Residents' complaint is not that the Match standing alone violates antitrust law, but that employers agree to fix the Residents' wages. The Match allegations, like those regarding other mechanisms identified in the complaint, are plus factors supporting an inference of that agreement and tending to exclude the possibility of independent conduct.

Two plus two equals four, and the savings clause applies to preserve the Residents' complaint here. Any contrary conclusion misinterprets the statute or the complaint, and both occurred here. It distorts the statute to view it as barring Match evidence to support "any" antitrust claim, *including* wage-fixing claims falling within the scope of the savings clause. Order, App. 4. This view ignores the plain language of the savings clause that "*Nothing in this section*" shall insulate wage-fixing claims. It also renders the savings clause a nullity, because any claim potentially saved would be eviscerated by the evidentiary provision. Additionally, it distorts the complaint to say that it "does not allege a price-fixing conspiracy," *id.* at 4; to say that the Match is "the basis" and "the centerpiece" of the complaint, *id.* at 3, 4, and to say that "the central premise of plaintiffs' complaint and its theory of liability turn entirely on the Matching Program." *Id.* at 5. The proposed amended complaint (App. 164-237) and the district court's earlier reading of the original complaint in *Jung I* (at App. 133-39, 142-46) show that these statements are all inaccurate.

1. The Lower Court Decisions Here Conflict With This Court's Precedents On Statutory Interpretation. A court may be tempted to gloss over a statute to reach the result that it believes Congress intended, but the obvious problem is that "the statute [is] the only sure expression of the will of Congress." *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267 (2004) (Scalia, J., concurring). The sure expression of Congress in the Match legislation's savings clause is that the normal protections of the Sherman Act apply where, as here, a claim alleges an agreement to fix wages. This is especially true because "the Sherman Act does express a longstanding congressional commitment to the policy of free markets and open competition . . . our precedents consistently hold that *exemptions from the antitrust laws must be construed narrowly.*" *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (emphasis added).

Congress is presumed not to include superfluous language in a statute, and a court's construction must "giv[e] effect, if possible, to every clause and word of a statute." *Clark v. Arizona*, 126 S. Ct. 2709, 2723 n.24 (2006). Here, relying on the evidentiary provision's term that it applies to "any" claim, App. 4, including the Residents' wage-fixing claim, gives no office to the savings clause and ignores the express predominance of the savings clause ("*nothing* in this section shall be construed" to extinguish wage-fixing claims). Moreover, "[t]he definition of words in isolation . . . is not necessarily controlling in statutory construction" where there are contrary considerations. *Dolan v. U.S. Postal Service*, 126 S. Ct. 1252, 1257 (2006). Indeed, where considering application of a savings clause, the only relevant factors are the scope of the clause and the type of claim; not even the scope of the overall exemption is important at the outset because it will be trumped anyway. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 867-68

(2000). Here, the district and Circuit courts were misguided in focusing on the substantive and evidentiary provisions and in looking for language that might conflict with the savings clause. By logic and by its own terms, the savings clause predominates.

Furthermore, statutes should not be interpreted to raise serious questions as to their constitutional validity. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Here, interpreting the Match legislation to preserve the Residents' claim through the savings clause avoids the serious separation of powers question raised by the evidentiary provision.

2. The Lower Court Decisions Here Conflict With This Court's Precedents On Separation Of Powers. The district court correctly ruled that even if Match activities are now lawful, "that alone is insufficient" to change *substantive* antitrust law to bar the Residents' complaint because "if lawful acts are used as the means to effectuate an antitrust conspiracy, the conspiracy itself is still unlawful." *Jung II*, App. 21, citing *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 707 (1962); *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946).

Leaving substantive law unchanged as to the Residents' complaint is precisely what dooms the lower courts' interpretation of the evidentiary provision as unconstitutional. New law may only "replace[] the [original] legal standards . . . without directing particular applications under either the old or the new standards." *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 437 (1992). More specifically, new law may not "compel[] ... findings or results under old law," nor "direct any particular findings of fact or applications of law, old or new, to fact." *Id.* at 438. It is not a change in substantive law to "tell judges when, how, or what to do." *Miller v. French*, 530 U.S. 327, 346 (2000). Congress may not prescribe the outcome of a case by "directing what particular steps shall be taken in the progress of a judicial inquiry." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 225 (1995).

One impermissible form of directing what particular steps shall be taken is "forbid[ding a court] to give the effect to evidence which, in its own judgment, such evidence should have . . . ." *United States v. Klein*, 80 U.S. 128 (1871). When Congress attempts to dictate such details to the judiciary, it "pass[es] the limit which separates the legislative from the judicial power." *Id.* at 133. The outer boundaries of *Klein* may be unclear, Order, App. 5, but whatever they are, *Klein* is consistently recognized for the proposition relevant here: that Congress may not interfere with the Judiciary's proper fact-finding. *See Schiavo ex rel. Schindler v. Schiavo*, 404 F.3d 1270, 1274 (11th Cir. 2005) (Birch, J., concurring) (stating that under *Klein*, legislation may not "direct a federal court in an area traditionally left to the federal court to decide" nor "rob[] federal courts of judicial doctrines long-established for the conduct of prudential decision making"). *See also Axel Johnson, Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 82 (2d Cir. 1993)("unlike the provision at issue in *Klein*," the statute "does not directly interfere with judicial fact finding"); *Anixter v. Home-Stake Prod. Co.*, 977 F.2d 1533, 1545 n.6 (10th Cir. 1992)("Notably absent from section 27A, unlike the statute held unconstitutional in *Klein*, is a specific directive as to what evidence a court may consider in determining the timeliness of the suit's filing or the case's merits"); *Green v. Peters*, No. 71 C 1403, 1997 WL 769458, at *10 (N.D. Ill., Dec. 5, 1997) ("Section 3626(b)(2) is plainly distinguishable from *Klein* in that it does not unduly constrain a federal court's ability either to evaluate evidence or to draw its own conclusions with regard to certain evidence"); *In re Taxable Municipal Bond Sec. Litig.*, 796 F. Supp. 954, 960 (E.D. La. 1992) ("the legislation in *Klein* dictated how the Court must find the facts without changing the legal rules that prescribe the rights and conduct of the parties").

The D.C. Circuit attempts to distinguish *Klein* on the basis that Congress may amend substantive law, App. 5, but *Klein* expressly recognizes that principle and holds that it is *not* a mere change in underlying law where "the court is forbidden to give the effect to evidence which, in its own judgment, such evidence should have . . . ." *Klein*, 80 U.S. at 147. While Congress may "create new circumstances" by changing a legal standard, it may not "prescribe [a] rul[e] of decision to the Judicial Department of the government in cases pending before it" because "the court [must be] left to apply its ordinary rules to the new circumstances." *Id.* at 146-147. Accordingly, "it is extremely important that the 1870 Act [invalidated in *Klein*] directed the decision in a pending case *through the infiltration of a domain that has been viewed as a traditionally judicial one – namely, that of determining an evidentiary matter*." Amy D. Ronner, *Judicial Self-Demise: the Test of When Congress Impermissibly Intrudes on Judicial Power*, 35 Ariz. L. Rev. 1037, 1048 (1993) (emphasis added).

Moreover, the evidentiary provision as interpreted by the lower courts here, just as in *Klein*, would improperly predetermine the outcome of litigation by allowing evidence on one side of the scale but not the other. "Evidence of any of the conduct described in the preceding sentence shall not be admissible in Federal court *to support* any claim or action alleging a violation of the antitrust laws," Section 207(b)(2), emphasis added. Congress may limit the admissibility of evidence, but not in a one-way manner intended to dictate a result and to prevent courts from "giv[ing] the effect to evidence which, in its own judgment, such evidence should have. . . ." *Klein,* 80 U.S. at 147. The evidentiary provision as here interpreted improperly ties one hand behind a court's back, requiring it to allow Match evidence to *refute* an antitrust claim but not to *support* one. That interference with a court's integrity is prohibited by the separation of powers doctrine.

B. The Lower Courts' Decisions Demonstrate A Conflict Among The Circuits Regarding The Proper Standard For Dismissal With Prejudice.

This Court established the standard for dismissal *with prejudice* in *Foman v. Davis,* 371 U.S. 178 (1962), a uniform standard ensuring consistency, predictability and fairness among all federal district and circuit courts. "One of the shaping purposes of the Federal Rules is to bring about uniformity in the federal courts . . . ." *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). "Because of an asserted conflict among the circuits and the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules . . . we granted certiorari." *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958).

In *Foman,* 371 U.S. at 182, this Court established that dismissal with prejudice is an abuse of discretion:

> in the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment . . . .

The highest of all judicial principles, adjudication on the merits, is at stake here. "If rules of procedure work as they should . . . they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966). Dismissal with prejudice should be applied sparingly, because "[i]f the underlying facts or circumstances relied on by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Foman,* 371 U.S. at 182. "[P]laintiff at the very least should be given the opportunity to file supplemental pleadings unless it appears beyond doubt that he cannot state a good cause of action." *Czosek v. O'Mara,* 397 U.S. 25, 27 (1970) (quotations omitted).

The rationale is well explained in 5B C. Wright & A. Miller, *Federal Practice & Procedure* § 1357 (3d ed. 2004) ("WRIGHT & MILLER," footnotes omitted):

> As the numerous case citations in the note below make clear, dismissal under Rule 12(b)(6) generally is not immediately final or on the merits because the district court normally will give the plaintiff leave to file an amended complaint to see if the shortcomings of the original document can be corrected. The federal rule policy of deciding cases on the basis of the substantive rights involved rather than on technicalities requires that the plaintiff be given every opportunity to cure a formal defect in the pleading. This is true even when the district judge doubts that the plaintiff will be able to overcome the shortcomings in the initial pleading. Thus, the cases make it clear that leave to amend the complaint should be refused only if it appears to a certainty that the plaintiff cannot state a claim.

The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh Circuits follow these principles and follow the standard established by *Foman*. *See, e.g., Doe v. Cassel*, 403 F.3d 986, 991 (8th Cir. 2005); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005); *Barry Aviation Inc. v. Land O'Lakes Municipal Airport Comm'n,* 377 F.3d 682, 687 (7th Cir. 2004); *Spanish Broadcasting System of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065, 1077 (11th Cir. 2004); *U.S. ex rel. Adrian v. Regents of University of California*, 363 F.3d 398, 403 (5th Cir. 2004); *Alston v. Parker,* 363 F.3d 229, 236 (3d Cir. 2004); *Lebron-Rios v. U.S. Marshal Service,* 341 F.3d 7, 15 (1st Cir. 2003); *Van Buskirk v. The New York Times Co.*, 325 F.3d 87, 91 (2d Cir. 2003); *Sheldon v. Vermonty*, 269 F.3d 1202, 1207 n. 5 (10th Cir. 2001); *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999).

In contrast, two circuit courts, the D.C. and Ninth Circuits, add a threshold requirement of "consistency" found nowhere in *Foman* or in the law of other circuits. "If a complaint is dismissed for failure to state a claim, leave to amend should be granted unless the court determines that the allegation of other facts *consistent with the challenged pleading* could not possibly cure the deficiency." *Schreiber Distrib. Co. v. Serv-Well Furniture Co., Inc.*, 806 F.2d 1393, 1401 (9th Cir. 1986) (emphasis added). "A dismissal with prejudice is warranted only when a trial court determines that the allegation of other facts *consistent with the challenged pleading* could not possibly cure the deficiency." *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (emphasis added).

The rationale for the "consistency standard" has never been adequately explained by either the D.C. or the Ninth Circuit, much less reconciled with contrary principles in *Foman* and Rule 8(e)(2) (allowing allegations "regardless of consistency," even in the same complaint). Indeed, the consistency standard materialized from thin air as off-hand *dicta* in *Bonanno v. Thomas,* 309 F.2d 320, 322 (9th Cir. 1962), a decision predating *Foman* by a few months. It came alive as law in the Ninth Circuit in *Rae v. Union Bank*, 725 F.2d 478, 480 (9th Cir. 1984) (citing *Bonanno*), where the court held that dismissal without leave to amend was proper because the complaint alleged no factual allegations supporting an unlawful tying claim and any amended complaint would need to "inconsistently" plead them.

Since *Rae*, the consistency standard has become well-entrenched law in the Ninth Circuit and has been repeated in more than 15 appellate decisions applying Ninth Circuit law. *See, e.g., Bradley v. Chiron Corp.*, 136 F.3d 1317, 1324-26 (Fed. Cir. 1998) (applying Ninth Circuit law to affirm California district court's dismissal with prejudice based on "discrepancies" in an amended and superseded complaint that "exceeded permissible adjustment of factual allegations"); *Reddy v. Litton Indus., Inc.*, 912 F.2d 291, 296-97 (9th Cir. 1990) (affirming dismissal with prejudice where complaint alleged injury due to wrongful termination and any amended complaint would have to allege RICO injury, because "[a]lthough leave to amend should be liberally granted, the amended complaint may only allege other facts consistent with the challenged pleading," (quotations omitted)); *Heisen v. Pacific Coast Bldg. Prod., Inc.*, 26 F.3d 130, 1994 WL 250036, at *2 (9th Cir. June 9, 1994) (unpublished) (affirming dismissal without leave to amend where complaint alleged intent to harm plaintiff in particular and any amended complaint would have to allege intent to harm competition generally). *See also Government Computer Sales Inc., v. Dell Mktg.,* No. 05-35936, 2006 WL 2467913, Slip. Op., at *3 (9th Cir. August 28, 2006) (unpublished); *Grogan v. Health Officer of County of Riverside,* 221 F.3d 1348, 2000 WL 674735, at *2 (9th Cir.

May 22, 2000) (unpublished); *Chem v. New York Life Ins. Co.,* 168 F.3d 498, 1999 WL 97289, at *2 (9th Cir. Feb. 25, 1999) (unpublished); *New v. Armour Pharmaceutical Co.,* 67 F.3d 716, 722 (9th Cir. 1995).

The consistency standard also continues to gain momentum among the large number of district courts in the Ninth Circuit, having been cited or applied in nearly fifty decisions so far this year. *See, e.g., Temple v. Adams,* No. CV-F-04-6716, 2006 WL 2454275, slip. op., at *10 (E.D. Cal. Aug. 23, 2006) (dismissing with prejudice where complaint alleged facts showing untimeliness of claim and consistent allegations could not cure); *Wheeler v. City of Oakland,* No. C 05-0647, 2006 WL 1140992, slip. op., at *8 (N.D. Cal. Apr. 28, 2006) (dismissing with prejudice where complaint alleged facts suggesting that city did not have policy of indifference to civil rights and any amended claim would have to plead inconsistent facts that it did); *U.S. v. University of San Francisco,* No. C 04-03440, 2006 WL 335316, at *3 (N.D. Cal. Feb. 14, 2006) (dismissing with prejudice where complaint alleged fact that termination was effective in May and any amended claim would have to plead inconsistent fact of August).

Indeed, in decisions dismissing *without* prejudice, some Ninth Circuit district courts now instruct plaintiffs not to replead any allegations inconsistent with the dismissed complaint or claim. *See, e.g., Rejects Skate Magazine, Inc. v. Acutrack, Inc.,* No. C 06-2590, 2006 WL 2458759, Slip Op., at *7 (N.D. Cal. Aug. 22, 2006) (plaintiffs may amend their complaint "if they can, truthfully and without contradicting the original complaint . . ."); *McDaniels v. Hospice of Napa Valley,* No. C 06-2558, 2006 WL 2038276, Slip. Op., at *9 (N.D. Cal. Jul. 19, 2006) ("Plaintiff is granted leave to amend to allege, if she can do so truthfully and without contradicting the original complaint").

The consistency standard followed a similar progression from unexamined roots to repeated *dicta* to law in the D.C. Circuit. The standard migrated to the D.C. Circuit from the Ninth Circuit when *Jarrell v. U.S. Postal Serv.*, 753 F.2d 1088, 1091 (D.C. Cir. 1985), quoted *Bonanno v. Thomas,* 309 F.2d 320, 322 (9th Cir. 1962). It gained momentum, although still *dictum*, when repeated in several circuit and district court decisions, namely *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996); *Andrx Pharmaceuticals, Inc. v. Biovail Corp., Int'l.*, 256 F.3d 799, 807 (D.C. Cir. 2001); *In re Office Prod. Co. Sec. Litig.*, 251 F. Supp. 2d 58, 75 (D.D.C. 2003); *Belizan v. Hershon*, 434 F.3d 579, 583 (D.C. Cir. 2006); and *Interbank Funding Corp. Sec. Litig.*, 432 F. Supp. 2d 51, 54 (D.D.C. 2006).

In this case, the D.C. Circuit's ruling transformed the consistency standard from *dictum* to law for the first time. "[D]ismissal with prejudice is warranted only when a district court determines that 'allegation of other facts *consistent with the challenged pleading* could not possibly cure the deficiency.'" Order, App. 5-6 (emphasis added, quoting *Firestone v. Firestone,* 76 F.3d at 1209). "The central premise of plaintiffs' complaint and its theory of liability turn entirely on the Matching Program" and "[a] proposed amendment advancing price-fixing claims absent the Matching Program . . . would not be 'consistent with the challenged pleading.'" *Id.* Setting aside the clear inaccuracy of these statements, the threshold consistency question ended the D.C. Circuit's inquiry here, and it never reached the *Foman* factors to determine whether the Residents' proposed Amended Complaint pleaded a Section 1 claim ("we need not reach the Rule 15(a) issue," Order, App. 7). The D.C. Circuit thus declined to endorse the district court's *dictum* that any amendment would be futile, and in fact implied that it would not be. "Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program." *Id.* If "future plaintiffs" may pursue the claim contained in the Amended Complaint, why are the Residents here being prevented from doing so?

Unless reviewed now by this Court, the consistency standard is likely to proliferate further and continue to gain momentum, having now taken root in two of the most cited Circuits in the country. Additionally, seeds of the consistency standard already lay waiting in the Third, Fifth, Seventh and Tenth Circuits, where decisions have recognized the concept. *See Roberts v. Mayor and Burgesses of London Borough of Brent*, 70 Fed. Appx. 615, 619 (3d Cir. 2003) (unpublished); *Murray v. Albany County Bd. of County Comm'rs*, 211 F.3d 1278, 2000 WL 472842, at *2 (10th Cir. Apr. 20, 2000) (unpublished); *Asher v. Harrington*, 461 F.2d 890, 895 (7th Cir. 1972); *Cupit v. U.S.*, 964 F. Supp. 1104, 1109 (W.D. La. 1997).

The inescapable consequence of conflicting procedural standards is conflicting substantive results. Here, the D.C. Circuit treated the "inconsistency" issue as dispositive -- and fatal -- even though consistency between an amended and superseded complaint would be completely irrelevant in any other circuit except the Ninth. Similarly, the D.C. Circuit expressly held that it "need not reach the Rule 15(a) issue," App. 7, even though the Rule 15(a) issue would be the dispositive issue under *Foman* and the law of all circuits other than the Ninth. "[T]o say that a district judge may not abuse his discretion is merely to say that the action in question . . . may not be done without considering relevant factors and giving a 'justifying reason.'" *Schlup v. Delo*, 513 U.S. 298, 348 (1995) (Scalia, J., dissenting, quoting *Foman*, 371 U.S. at 182). That did not happen here, and regularly fails to happen in the D.C. and Ninth Circuits. This conflict among the circuits and with this Court as to the proper standard for dismissal with prejudice should be resolved.

C. The Lower Courts' Decisions Demonstrate A Conflict Among The Circuits Regarding The Proper Standard For Post-Judgment Leave To Amend After Dismissal On The Pleadings.

A similar split of authority among the Circuit Courts exists with respect to another important, frequently-arising and dispositive procedural issue: the proper standard for post-judgment leave to amend the complaint after dismissal. Such motions involve tension between two Federal Rules of Civil Procedure: Rule 15(a), which governs amendments and allows them generously, and Rule 59(e), which governs post-judgment proceedings and allows them only sparingly. "Most courts faced with the problem have held that once a judgment is entered the filing of an amendment cannot be allowed until the judgment is set aside or vacated under Rule 59 or Rule 60." 6 WRIGHT & MILLER § 1489.

This Court has never articulated a general standard for altering or amending judgment under Rule 59(e). Proper grounds vary among the Circuit Courts and consist of some combination of an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice. *See Messina v. Krakower,* 439 F.3d 755, 758-59 (D.C. Cir. 2006); *Marks 3 Zet-Ernst Marks GmBh & Co. KG v. Prestek, Inc.*, 455 F.3d 7, 15 (1st Cir. 2006); *Ingle ex rel. Estate of Ingle v. Yelton,* 439 F.3d 191, 197 (4th Cir. 2006); *Coliseum Square Ass'n, Inc. v. Jackson,* __ F.3d __, 2006 WL 2664455 (5th Cir. Sept. 18, 2006); *Munafo v. Metropolitan Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004); *Intera Corp. v. Henderson,* 428 F.3d 605, 620 (6th Cir. 2005), *cert. denied*, 126 S. Ct. 1782

(2006); *Circuit City Stores, Inc. v. Mantor*, 417 F.3d 1060, 1064 n.1 (9th Cir. 2005); *Kapelanski v. Johnson*, 390 F.3d 525, 532 (7th Cir. 2004); *Capitol Indemnity Corp. v. Russellville Steel Co., Inc.*, 367 F.3d 831, 834 (8th Cir. 2004); *Servants of Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000); *Max's Seafood Café ex rel. Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999); *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999).

All of these Rule 59(e) standards are considerably higher than the liberal Rule 15(a) standard for leave to amend that this Court established in *Foman v. Davis*, 371 U.S. 178, 182 (1962):

> If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be "freely given."

Because in summary judgment or post-trial situations the lower standard of Rule 15(a) is not reached unless the higher standard of Rule 59(e) is met as a threshold requirement, many amendments are barred post-judgment that would be permitted pre-judgment. "This approach appears sound. To hold otherwise would enable the liberal amendment policy of Rule 15(a) to be employed in a way that is contrary to the philosophy favoring finality of judgments and the expeditious termination of litigation." 6 WRIGHT & MILLER § 1489.

But a majority of Circuit Courts, and indeed this Court, hold that this approach is *not* sound where judgment is *on the pleadings* because the policies underlying Rule 59(e) are largely applicable only to more substantive judgments, like summary judgment and judgment at trial. This Court applies the lower Rule 15(a) standard to post-judgment motions to amend the complaint after judgment on the pleadings, and applies the higher Rule 59(e) standard only as to more substantive judgments. In *Foman*, the district court dismissed the plaintiff's complaint under Rule 12(b)(6) and entered judgment, subsequently denying a motion to vacate and amend (which were treated by this Court as a Rule 59(e) motion). 371 U.S. at 180. The Court of Appeals affirmed. *Id.* at 181. This Court reversed, ruling that denial of the plaintiff's Rule 59(e) motion was an abuse of discretion where she met the repleading standard of Rule 15(a). *Id.* at 182.

Not surprisingly, the First, Second, Third, Fourth, Fifth, Sixth, Tenth and Eleventh Circuits have adopted the sensible (and, for that matter, binding) approach of this Court. *See Laber v. Harvey*, 438 F.3d 404, 427-28 (4th Cir. 2006) ("A conclusion that the district court abused its discretion in denying a motion to amend, however, is sufficient grounds on which to reverse the district court's denial of a Rule 59(e) motion"); *Spanish Broadcasting System of Fla., Inc. v. Clear Channel Communications, Inc.*, 376 F.3d 1065 (11th Cir. 2004) ("the[] same [Rule 15(a)] standards apply when a plaintiff seeks to amend after a judgment of dismissal has been entered by asking the district court to vacate its order of dismissal pursuant to [Rule] 59(e)."); *Rosenzweig v. Azurix Corp.*, 332 F.3d 854, 864 (5th Cir. 2003) ("the disposition of the plaintiff's motion to vacate under rule 59(e) should be governed by the same considerations controlling the exercise of discretion under rule 15(a)"); *Morse v. McWhorter*, 290 F.3d 795, 799 (6th Cir. 2002) ("Where a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and Rule 59 inquiries turn on the same [Rule 15] factors"); *Cureton v. National Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001) ("Where a timely motion to amend judgment is filed under Rule 59(e), the Rule 15 and 59 inquiries turn on the same [Rule 15] factors"); *Judge v. City of Lowell*, 160 F.3d 67, 79 (1st Cir. 1998) (applying Rule 15(a) standard to motion to amend following Rule 12(b)(6) dismissal and judgment); *Acito v. IMCERA Group, Inc.*, 47 F.3d 47, 54-55 (2d Cir. 1995) (applying Rule 15(a) standard to Rule 59(e) motion after dismissal and judgment on the pleadings); *Bauchman for Bauchman v. West High Sch.*, 132 F.3d 542, 559 (10th Cir. 1997) ("To safeguard a plaintiffs' opportunity to test her claims on the merits, Rule 15(a) . . . provides that leave of the court to amend the pleadings should be freely given when justice requires.")

The D.C. Circuit disagrees, and applies the higher Rule 59(e) standard to judgments *on the pleadings* in addition to more substantive judgments. As stated here (Order, App. 6):

> After a district court has dismissed a complaint with prejudice, a party can amend that complaint under Rule 15(a) only by first prevailing on a Rule 59(e) motion to alter of amend the judgment. *Firestone* [*v. Firestone*, 76 F.3d 1205, 1208 (D.C. Cir. 1996)]. Although Rule 15(a)'s liberal standard for granting leave to amend governs once the court has vacated the judgment, a party must first satisfy Rule 59(e)'s more stringent standard.

Only the Seventh, Eighth and Ninth Circuits join the D.C. Circuit in applying the higher Rule 59(e) standard and failing to distinguish between judgments on the pleadings and more substantive judgments. As described by the Ninth

Circuit, "[t]he issue is not leave to amend . . . . The question is whether the court, when it dismissed the case, committed some clear error that required it to reopen that judgment." *Weeks v. Bayer*, 246 F.3d 1231, 1236-37 (9th Cir. 2001) (rejecting Rule 15(a) standard and applying the Rule 59(e) standard to a motion to amend following judgment on the pleadings). *See also Burgess v. Sailors' Union of Pacific,* 63 Fed. Appx. 337, 339 (9th Cir. 2003) (unpublished) (applying the Rule 59(e) standard and rejecting that of Rule 15(a) because "[t]he rationale requiring courts to liberally grant leave to amend is inapposite after the entry of judgment"); *Adamson v. Lockheed Martin Idaho Technologies Co.*, 20 Fed. Appx. 715, 718 (9th Cir. 2001) (unpublished) (applying Rule 59(e) standard). The Seventh Circuit holds that while Rule 15(a) presumes liberal leave to amend, "this presumption is reversed in cases, such as here, where a plaintiff seeks to amend a complaint after judgment has been entered and a case has been dismissed." *Bressner v. Ambroziak*, 379 F.3d 478, 484 (7th Cir. 2004) (declining to apply the Rule 15(a) standard to a motion to amend following judgment on the pleadings, citing several Seventh Circuit cases). Similarly, the Eighth Circuit holds that "although a motion to amend a complaint should be freely given under [Rule] 15(a), different considerations apply to motions filed after dismissal" on the pleadings, requiring a "valid reason" for failure to amend earlier. *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997) (quotations omitted). *Cf. Sanders v. Clemco Indus.,* 823 F.2d 214, 216-17 (8th Cir. 1987) (applying Rule 15(a) standard to post-judgment motion to amend).

In its Order, the D.C. Circuit ruled that the high standard of Rule 59(e) was not met in this case because there was no change of intervening law, no new evidence, no clear error below, and no manifest injustice. App. 7. Its only explanation was that "plaintiffs forfeited any claim of an abuse of discretion" because the Match legislation was enacted in April 2004 and plaintiffs "had both the time and opportunity to request leave to amend their complaint prior to the entry of judgment [in August 2004], but chose not to." *Id.* The Residents did not move to amend during that period, of course, because they did not concede that the new statute was fatal to their claim and they were entitled to a court ruling on that issue.

Setting aside the number of Circuit Courts that strictly apply the Rule 59(e) standard to post-judgment motions to amend the complaint after dismissal on the pleadings, the D.C. Circuit appears to stand entirely alone in holding that the Rule 59(e) standard is not met where the *post*-judgment motion to amend could have been made *pre*-judgment. Order, App. 7. If that is a legitimate basis to deny Rule 59(e) relief, then a district court's discretion has virtually no bounds at all because post-judgment motions are almost always made precisely because they were *not* made pre-judgment. The D.C. Circuit broke new ground in adopting a concept that has so far been applied only where no Rule 59(e) motion was made—that *dismissal with prejudice* is not an abuse of discretion where no pre-judgment motion for leave to amend was made, thus improperly raising the amendment issue for the first time on appeal. *See, e.g., Greenidge v. Allstate Ins. Co.*, 446 F.3d 356 (2d Cir. 2006) (plaintiffs may move to amend pre-or post-judgment, and where they do neither "a district court does not abuse its discretion when it fails to grant leave to amend a complaint without being asked to do so.") The D.C. Circuit's bright line hints at the Rule 15(a) consideration of "undue delay" (although it expressly declined to reach Rule 15(a) issues, App. 7), but the circuits are split on the proper standard there, too, and a simple pre- and post-judgment distinction follows neither. *See Minter v. Prime Equipment Co.*, 451 F.3d 1196, 1205-06, n.15 (10th Cir. 2006) (noting that the Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth and D.C. Circuits require prejudice, bad faith, futility or a substantial burden on the court to find undue delay, while the First, Third, Tenth and Eleventh Circuits focus on whether the delay is justified in light of all circumstances.)

On this second procedural issue of amending the complaint after judgment on the pleadings, like the first issue of dismissal with prejudice, the D.C. Circuit applied a standard contrary to the standard endorsed by this Court and contrary to the standard applied by a majority of Circuit Courts. Once again, the issues that were dispositive here -- Rule 59(e) considerations and the Residents' failure to amend pre-judgment -- would have been irrelevant in the First, Second, Third, Fourth, Fifth, Sixth, Tenth and Eleventh circuits. By the same token, the issue that would have been dispositive in those Circuits under the standard endorsed by this Court -- Rule 15(a) -- was not even reached here. Nothing in the D.C. Circuit's decision found or even insinuated that the Residents' Amended Complaint failed to satisfy Rule 15(a). This conflict among the circuits and with this Court as to the proper standard for post-judgment repleading of a complaint should be resolved. *See Hanna v. Plumer*, 380 U.S. 460, 472 (1965) (emphasizing the importance of uniformity in application of federal procedural rules); *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958) (granting certiorari to ensure uniformity in application of federal procedural rules).

CONCLUSION

For the foregoing reasons, petitioners Paul Jung, M.D.; Denise Greene, M.D.; and Luis Llerena, M.D.; respectfully request a writ of certiorari to review the June 1, 2006 decision of the Court of Appeals for the District of Columbia Circuit in this case.

Respectfully submitted,

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October 23, 2006

United States Court of Appeals
For the District of Columbia Circuit.

No. 04-7023

Paul Jung, M.D., et al.,
Appellees

v.

ASSOCIATION OF AMERICAN
MEDICAL COLLEGES, et al.,
Appellees

National Resident Matching Program,
Appellant.

Consolidated with 04-7138.

Appeals from the United States District Court
for the District of Columbia
(No. 02cv00873)

Before: RANDOLPH and GRIFFITH, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

JUDGMENT

(Filed Jun. 1, 2006)

This appeal was considered on the record from the United States District Court for the District of Columbia and on the briefs and arguments of the parties. It is

ORDERED and ADJUDGED that the District Court's August 12, 2004 order and judgment be affirmed.

The District Court did not err in dismissing the complaint with prejudice pursuant to Rules 12(b)(6) and 12(c) of the Federal Rules of Civil Procedure on the grounds that plaintiffs could "prove no set of facts in support of [their] claim which would entitle [them] to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *see Sparrow v. United Air Lines, Inc.,* 216 F.3d 1111, 1113 (D.C. Cir. 2000). We review the dismissal of a complaint *de novo,* "view[ing] the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the non-moving party." *Peters v. Nat'l R.R. Passenger Corp.,* 966 F.2d 1483, 1485 (D.C. Cir. 1992) (quotation marks omitted).

Paul Jung, M.D., Denise Green, M.D., and Luis Llerena, M.D., ("plaintiffs") brought suit in May 2002 against a number of teaching hospitals, medical schools, and non-profit associations (collectively, "defendants") involved in graduate medical education, challenging the way medical students are assigned to residency programs by one of the defendants, the National Resident Matching Program ("Matching Program"). The single-count complaint alleged that defendants participated in a conspiracy, in violation of the Sherman Act, 15 U.S.C. § 1, to "illegally restrain competition in the market for resident physician services" by "(a) stabilizing wages below competitive levels by exchanging competitively sensitive information regarding resident physician compensation and other terms of employment; (b) eliminating competition in the recruitment and employment of resident physicians by assigning prospective resident physician employees to positions through the National Resident Matching Program . . . ; and (c) establishing and complying with anticompetitive and accreditation standards and requirements." Compl. in 02-0873 at 5-6.

On April 10, 2004, the Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596 (2004) (the "Act"), became law. Section 207 of the Act, 15 U.S.C. § 37b, not only exempts "graduate medical education residency matching program[s]" from antitrust laws, but it also bars evidence of any participation in such programs in support of a claim in federal court that antitrust laws have been violated, *id.* § 37b(b)(2). A savings clause provides that Section 207 does not exempt from antitrust laws "any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs," *id.* § 37b(b)(3). By its express terms, Section 207 applies to suits pending when it became law. *Id.* § 37b(c).

Within days of enactment, defendants moved to dismiss the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6) and 12(c). On August 12, 2004, the District Court granted the motion and dismissed the complaint with prejudice, holding that plaintiffs' claim relied entirely upon the Matching Program and was, therefore, barred by Section 207.

We affirm the District Court. The Matching Program is the basis for plaintiffs' complaint, and it falls squarely within both the exemption and bar of Section 207. The Act defines the term "graduate medical education resident matching program" by reference to the very program at issue in the complaint: "the National Resident Matching Program." 15 U.S.C. § 37b(b)(1)(C). It is hard to imagine a more precise fit between the language of a statute and a lawsuit. Plaintiffs attempt to recast the allegations of the complaint as a price-fixing scheme independent of the Matching Program so that they can claim the protection of the savings clause, *id.* § 37b(b)(3). They argue that the savings clause permits the use of evidence of participation in the Matching Program in a price-fixing case. We agree with the District Court that the complaint's allegations are inextricably intertwined with the Matching Program and thus prohibited by Section 207. "The complaint does not allege a price-fixing conspiracy, but a single overriding integrated antitrust conspiracy with the Match as its centerpiece." Op. in 02-0873 at 15. Plaintiffs fail "to demonstrate that absent the Match allegations, the Court in fact would have come to the same conclusion that 'a conspiracy existed.'" *Id.* at 16. We also agree that Section 207's evidentiary bar, which applies to "*any* claim or action alleging a violation of the antitrust laws," 15 U.S.C. § 37b(b)(2) (emphasis added), applies to plaintiffs' claim because the bar "forbids invocation of the Match program as evidence in any antitrust suit, including one involving allegations of price-fixing." Op. in 02-0873 at 18.

Plaintiffs' constitutional argument is likewise unavailing. They argue that Section 207 violates the separation of powers because "Congress has attempted to place a thumb on the scales in pending litigation." Pl.'s Br. in 04-7138 at 31. But Congress has done nothing more here than amend the antitrust laws by carving out a safe harbor for participation in "graduate medical education residency matching program[s]." Congress may amend substantive laws, even when doing so affects pending litigation. *See Robertson v. Seattle Audubon Soc'y,* 503 U.S. 429, 438 (1992) (upholding a statute enacted in response to pending environmental litigation because it did not "direct any particular findings of fact or applications of law, old or new," but rather amended the governing substantive law). Congress may also change laws governing how evidence may be used. *See Tot v. United States,* 319 U.S. 463, 467 (1943) ("Congress has power to prescribe what evidence is to be received in the courts of the United States."). Plaintiffs rely upon *United States v. Klein*, 80 U.S. 128 (1871), a case in which the Supreme Court struck down a statute that limited the scope of the President's pardon power in an effort to change on appeal the result of cases that had already been decided. "Whatever the precise scope of *Klein,* however, later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 218, (1995) (quoting *Seattle Audubon,* 504 U.S. at 441); *see also National Coalition to Save Our Mall v. Norton,* 269 F.3d 1092, 1096 (D.C. Cir. 2001) (declining to find separation of powers violation under *Klein* when Congress made amendment to substantive law that affected pending litigation).

Plaintiffs argue in the alternative that dismissal of their complaint should have been without prejudice. We review a dismissal with prejudice for abuse of discretion, *see United States ex rel. Williams v. Martin-Baker Aircraft Co.,* 389 F.3d 1251, 1259 (D.C. Cir. 2004); *Confederate Memorial Ass'n v. Hines,* 995 F.2d 295, 298-99 (D.C. Cir. 1993), and find none here. In *Firestone v. Firestone,* 76 F.3d 1205, 1209 (D.C. Cir. 1996), we held that dismissal with prejudice is warranted only when a district court determines that "allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency." The central premise of plaintiffs' complaint and its theory of liability turn entirely on the Matching Program.

A proposed amendment advancing price-fixing claims absent the Matching Program that would survive Section 207's exemption and bar would not be "consistent with the challenged pleading." *See Firestone,* 76 F.3d at 1209. Any allegation of other facts "consistent with the challenged pleading" would necessarily involve the Matching Program and "could not possibly cure the deficiency of the complaint." *See id.* We affirm the District Court's dismissal with prejudice.

FURTHER ORDERED that the District Court's January 25, 2005 order denying plaintiffs' Rule 59(e) motion to alter or amend the judgment and their Rule 15(a) motion for leave to file an amended complaint be affirmed. We review denial of a Rule 59(e) motion for abuse of discretion. *See Firestone,* 76 F.3d at 1208. We find no abuse of discretion. After their complaint was dismissed with prejudice, plaintiffs filed a Rule 59(e) motion seeking to modify the judgment and a Rule 15(a) motion to allow the filing of an amended complaint. The District Court denied plaintiffs' motions and held that the high standard for relief under Rule 59(e) had not been met. After a district court has dismissed a complaint with prejudice, a party can amend that complaint under Rule 15(a) only by first prevailing on a Rule 59(e) motion to alter or amend the judgment. *Firestone,* 76 F.3d at 1208. Although "Rule 15(a)'s liberal standard for granting leave to amend governs once the court has vacated the judgment," *Firestone,* 76 F.3d at 1208, a party "must first satisfy Rule 59(e)'s more stringent standard." *Id.* "A Rule 59(e) motion 'is discretionary' and need not be granted unless the district court finds that there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Id.* (citation omitted).

Here, there was no change of intervening law (Section 207 was enacted several months before the complaint was dismissed), no new evidence had become available, and the District Court's ruling contains no "clear error" and threatens no "manifest injustice." Dismissal of the complaint was warranted because it clearly falls within the range of suits Congress preempted by Section 207. As the District Court noted, "[p]laintiffs had both the time and opportunity to request leave to amend their complaint prior to the entry of judgment, but chose not to." Mem. Op. in 02-0873 at 3. "By failing to advise the court in a timely fashion – i.e., before the court ruled on the motion to dismiss" – that they were willing to amend their Complaint in light of Section 207, plaintiffs "forfeited any claim of an abuse of discretion." *See Ciralsky v. CIA,* 355 F.3d 661, 673 (D.C. Cir. 2004). Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program.

Because we affirm the District Court's refusal to grant the Rule 59(e) motion, we need not reach the Rule 15(a) issue. In addition, because we affirm the dismissal of the complaint, we do not reach the question of whether the District Court abused its discretion in denying the motion of the National Resident Matching Program to compel arbitration of plaintiffs' claim.

Pursuant to D.C. Circuit Rule 36, this disposition will not be published. The Clerk is directed to withhold issuance of the mandate herein until seven days after resolution of any timely petition for rehearing or rehearing *en banc*. *See* Fed. R. App. P. 41(b); D.C. Cir. R. 41.

Per Curiam
FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Michael C. McGrail
Deputy Clerk

339 F. Supp. 2d 26

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D., et al.,)
Plaintiffs,)
)
v.) Civil Action No. 02-0873 (PLF)
)
ASSOCIATION OF)
AMERICAN MEDICAL)
COLLEGES, et al.,)
)
Defendants.)

OPINION

(Filed Aug. 12, 2004)

This matter is before the Court for consideration of Defendants' Motion for Judgment on the Pleadings. Plaintiffs in this putative class action are medical school graduates currently or formerly enrolled in resident physician "residency" programs. The defendants can be categorized into two groups: the organizational defendants (organizations and associations that participate in the administration of graduate medical education in the United States) and the institutional defendants (universities, medical schools, foundations, hospitals, health systems and medical centers that sponsor medical residency programs). Plaintiffs filed suit charging that the defendants have violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Specifically, plaintiffs allege that the defendants have contracted, combined and conspired among themselves to "displace competition in the recruitment, hiring, employment and compensation of resident physicians, and to impose a scheme of restraints which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment." Complaint ("Compl.") ¶ 2.

On February 11, 2004, the Court issued an Opinion and Order addressing certain defendants' motions to dismiss this action on various grounds. *See Jung v. Association of American Medical Colleges*, 300 F. Supp. 2d 119 (D.D.C. 2004) ("February 11 Opinion and Order"). After the Court issued this Opinion and Order, Congress enacted and President George W. Bush signed into law the Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596 (2004), which includes a provision entitled "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs," an amendment to the antitrust laws that has been codified as 15 U.S.C. § 37b. Certain defendants now move under Rule 12(c) of the Federal Rules of Civil Procedure for judgment on the pleadings on the ground that the action must be dismissed in light of this new legislation which creates or confirms an antitrust exemption for graduate medical education residency matching programs.

I. BACKGROUND

A. *Plaintiffs' Allegations*

In their class action complaint in this case, plaintiffs assert that there are three intertwining prongs to the antitrust conspiracy they allege. The first prong of the alleged conspiracy concerns the annual assignment of fourth-year medical students to the institutional defendants' residency programs by the National Resident Matching Program ("NRMP"). The NRMP, an Illinois not-for-profit corporation, is managed and operated by defendant American Association of Medical Colleges ("AAMC") from AAMC's principal office in Washington, D.C. *See* Compl. ¶ 15. The AAMC also is an Illinois not-for-profit corporation, whose membership includes all 125 accredited medical schools, including those medical schools named in the complaint, and approximately 375 major teaching hospitals and health systems, some of which also are named in the complaint. These hospitals and health systems are member hospitals of a subsection of the AAMC, the Council of Teaching Hospitals and Health Systems ("COTH") Section. *See id.* ¶ 17.

Plaintiffs further allege that in order to effectuate the assignment, or the "Match," as it is commonly called, prospective medical residents enter into contracts with and submit to the NRMP a ranked list of desired medical resident positions with various institutions ("Student Match Contract"). The institutions themselves also enter into contracts with the NRMP and submit ranked lists of the medical students whom they are interested in hiring ("Institutional Match Contract"). On a date certain, the NRMP through an algorithm "matches" the students' lists against the institutions' rankings, resulting in the assignment of each prospective medical resident to one residency program. *See* Compl. ¶¶ 15, 83-86. Plaintiffs allege that this system eliminates a free and competitive market and substitutes a centralized, anticompetitive allocation system that assigns prospective resident physicians to a single, specific and mandatory residency program. Plaintiffs further allege that the defendants designed and implemented this system and collectively agreed to comply with it in violation of the antitrust laws. *See id.* ¶ 83.

Several specific features of this assignment system allegedly serve to impose anticompetitive restraints on medical residency hiring. Plaintiffs allege that a medical student is required to enter into the Match if he or she wishes to gain employment in a residency program accredited by defendant Accreditation Council for Graduate Medical Education ("ACGME"). *See* Compl. ¶ 71. An individual's participation in an ACGME-accredited residency program in turn allegedly is a prerequisite for specialty certification by a member board of defendant American Board of Medical Specialties ("ABMS"), an Illinois not-for-profit corporation consisting of 24 recognized medical specialty certification boards, upon completion of the residency. *See id.* ¶¶ 20, 69. Plaintiffs allege that eventual specialty certification by an ABMS board is considered critical to prospective residents inasmuch as they desire to be "certified" to practice within a specialty following the completion of their residencies. The practical effect of this structure, plaintiffs charge, is that the vast majority of medical students are compelled to participate in the Match, which is a substitute for all aspects of competitive individual negotiations and requires applicants to commit contractually to any assigned position as a condition of enrolling in the Match Program. *See id.* ¶¶ 69, 86. Furthermore, certain implementing policing mechanisms of the Match allegedly compel compliance with the foregoing restraints. These alleged mechanisms include the requirement that program participants immediately report suspected policy violations to the NRMP and advise the relevant organizational authorities of institution or resident physician violations. *See id.* ¶ 86(c).

In the second prong of the alleged conspiracy, plaintiffs assert that certain aspects of the aforementioned

ACGME accreditation standards, with which the institutional defendants allegedly voluntarily comply, function to further restrict residency employment. Specifically, plaintiffs allege that the ACGME (1) has the authority to regulate the number of employment positions in a residency program; (2) imposes substantial obstacles to the ability of a resident to transfer employment from one employer to another during the period of a residency, thereby effectively making NRMP assignments permanent for the duration of a residency; (3) encourages and/or requires participation in the Match by an institution as a condition of accreditation; and (4) directly reviews compensation and other terms of employment with the purposes of fixing and depressing them. *See* Compl. ¶ 88.

The third prong of the alleged conspiracy concerns the exchange by defendants of information on resident compensation and other terms of employment through surveys and databases that plaintiffs allege has the purpose and effect of standardizing and stabilizing compensation and other terms of employment. *See* Compl. ¶¶ 73-82. This exchange allegedly occurs in two ways. First, the AAMC annually surveys members of its COTH Section seeking compensation levels for the employment year, aggregates the results into various categories and distributes its findings in an annual report (the "COTH Survey" or "Survey"). *See id.* ¶¶ 74-79. Second, hospitals and health systems access similar information through an electronic database known as the Fellowship and Residency Electronic Interactive Database ("FREIDA"), which is maintained by defendant American Medical Association ("AMA"). *See id.* ¶ 80. Plaintiffs allege that this exchange of information allows institutional defendants to fix resident salaries and benefits each year at depressed, anticompetitive levels.

Plaintiffs charge that the execution of the Match program, the enforcement of the ACGME-accreditation standards, and the coordinated collection and distribution of residency program compensation information together produce a significant depression of residents' salaries and working conditions by removing residents' ability to achieve enhanced salaries and working conditions through competition. *See* Compl. ¶¶ 92-96. Plaintiffs allege that defendants have violated Section 1 of the Sherman Act by contracting, combining and conspiring to unreasonably restrain trade and commerce. Plaintiffs filed this antitrust action as a proposed class action and have moved to certify both plaintiff and defendant classes. *See* Motion for Class Certification, filed November 3, 2003.

B. The February 11 Opinion and Order

In its February 11 Opinion and Order, the Court (1) denied certain institutional defendants' motion to dismiss for lack of personal jurisdiction; (2) granted the motion to dismiss for lack of personal jurisdiction of defendants Washington University Medical Center, the American Board of Medical Specialties and the Council of Medical Specialty Societies; (3) denied defendant National Resident Matching Program's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure and its motion to compel arbitration, and denied the motion to compel arbitration filed by the American Medical Association; (4) denied the motions to dismiss for failure to state a claim upon which relief can be granted filed by the Association of American

Medical Colleges and the Accreditation Council for Graduate Medical Education; and (5) granted the motions to dismiss for failure to state a claim filed by the American Hospital Association, the American Medical Association and Yeshiva University.

Specifically, the Court first concluded that it had personal jurisdiction over certain institutional defendants under the "conspiracy theory" of personal jurisdiction. The Court found that plaintiffs adequately had alleged "a conspiracy to depress resident compensation between, *inter alia,* those institutional defendants that participated in the Match and the NRMP" and that certain acts in furtherance of the conspiracy had taken place in the District of Columbia. *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 142. The Court further concluded that it did not have personal jurisdiction over those moving defendants that plaintiffs had not adequately alleged participated in the conspiracy. *See id.* at 143. Second, the Court denied defendant NRPM's motion to compel arbitration of those elements of the conspiracy claim that concerned the Match, concluding that the Supreme Court's decision in *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690 (1962), and its progeny manifested "a clear and compelling countervailing interest in the comprehensive adjudication of conspiracy claims brought under the Sherman Act." *Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 156. The Court denied the motion of the American Medical Association to compel arbitration on similar grounds. *See id.*

Third, the Court denied the motions to dismiss for failure to state a claim filed by the Association of American Medical Colleges and the Accreditation Council for Graduate

Medical Education, concluding that "plaintiffs adequately have alleged a common agreement to displace competition in the recruitment, hiring, employment and compensation of resident physicians and to impose a scheme of restraints that has the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment among certain defendants" and that the moving defendants participated in that conspiracy. *Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 173-74. In considering the Rule 12(b)(6) motions, the Court assessed the conspiracy allegations holistically rather then parsing out and considering those allegations that expressly related to the individual moving defendants. *See id.* at 160-61 (citing *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. at 699, and *American Tobacco Co. v. United States,* 328 U.S. 781, 809 (1946)).[1]

C. The New Legislation

On April 10, 2004, President Bush signed into law the Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596 (2004), which includes Section 207 entitled "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs," now codified as 15 U.S.C. § 37b ("Section 207"). At its core, Section 207 provides that "[it] shall not be unlawful under the antitrust laws to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program." 15 U.S.C. § 37b(b)(2) (the "substantive" provision). In addition, the statute provides that "[e]vidence of any of the conduct described in the preceding sentence shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws." *Id.* (the "evidentiary prohibition"). The stated purposes of the law are to "confirm that the antitrust laws do not prohibit sponsoring, conducting, or participating in a graduate medical education residency matching program, or agreeing to do so; and . . . [to] ensure that those who sponsor, conduct or participate in such matching programs are not subjected to the burden and expense of defending against litigation that challenges such matching programs under the antitrust laws." 15 U.S.C. § 37b(a)(2)(A)-(B). Section 207 creates a price-fixing exemption for a certain class of antitrust claims, providing that "[n]othing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs." 15 U.S.C. § 37b(b)(3).

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[1] The Court concluded that plaintiffs failed to allege adequately that defendants AHA, AMA and Yeshiva University participated in the conspiracy. *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 173-74.

Section 207 took effect on April 10, 2004, and applies "to conduct whether it occurs prior to, on, or after such date of enactment" and "to all judicial and administrative actions or other proceedings pending on such date of enactment." 15 U.S.C. § 37b(c). Defendants argue that judgment must be entered on their behalf because Section 207 precludes plaintiffs from pursuing their claim in light of the Court's conclusion in the February 11 Opinion and Order that plaintiffs allege a single overarching conspiracy with three interrelated prongs with the Match program at its center. Section 207 requires this conclusion, defendants argue, both by expressly exempting the Match program and its participants from the antitrust laws and by forbidding the consideration of evidence related to any entities' sponsorship, conduct, or participation in a graduate medical education residency matching program, or agreement to sponsor, conduct, or participate in such a program, in support of any antitrust claim. *See* Defendants' Motion for Judgment on the Pleadings ("Defs.' Mot.") at 5-6. Defendants further argue that the legislation expressly applies to this action and that the "price-fixing" clause does not save plaintiffs' claim. *See id.* at 6-7.

II. DISCUSSION

A. *Procedural Posture of Defendants' Motion*

Plaintiffs first argue that defendants' motion for judgment on the pleadings is premature because fifteen of the moving defendants have not yet answered the complaint. *See* Plaintiffs' Response Opposing Defendants' Rule 12(c) Motion for Judgment on the Pleadings ("Pls.' Opp.") at 2-3. Rule 12(c) of the Federal Rules of Civil Procedure states that "[a]fter the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings." FED. R. CIV. P. 12(c). This argument must fail, however, because if a party files a Rule 12(c) motion before its answer, the Court may treat it as a motion to dismiss under Rule 12(b)(6) for failure to state a claim. *See Dale v. Executive Office of the President,* 164 F. Supp. 2d 22, 24 (D.D.C. 2001) (citing *Seber v. Unger,* 881 F. Supp. 323, 325 n.2 (N.D. Ill. 1995)); *Moran v. Peralta Community College Dist.,* 825 F. Supp. 891, 894 (N.D. Cal. 1993) (considering Rule 12(c) motion even though all defendants had not yet answered because otherwise plaintiff could avoid Rule 12(c) motion simply by not serving one defendant).

No prejudice to any party results from treating a Rule 12(c) motion as a Rule 12(b)(6) motion because the standard of review for motions for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is essentially the same as that for motions to dismiss under Rule 12(b)(6). *See Ramirez v. Dep't of Corrections,* 222 F.3d 1238, 1240-41 (10th Cir. 2000); *Haynesworth v. Miller,* 820 F.2d 1245, 1254 (D.C. Cir. 1987); *Transworld Products Co. v. Canteen Corp.,* 908 F. Supp. 1, 2 (D.D.C. 1995). On either motion, the Court may not rely on facts outside the pleadings and must construe the complaint in the light most favorable to the non-moving party. *See Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994). Granting judgment on the pleadings pursuant to Rule 12(c) or a motion to dismiss for failure to state a claim under Rule 12(b)(6) is warranted only if it appears beyond doubt, based on the allegations contained in the complaint, that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). *See also Alicke v. MCI Communications Corp.,* 111 F.3d 909, 912 (D.C. Cir. 1997).

Fourteen of the moving defendants have filed answers.[2] The remaining 15 movants have not filed an answer or a motion to dismiss pursuant to Rule 12(b)(6). Although certain defendants in this latter group filed motions to dismiss for lack of personal jurisdiction under

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[2] Contrary to the allegations in plaintiffs' brief, defendants ACGME and AAMC have filed answers to the complaint.

Rule 12(b)(2), such motions do not preclude them from later filing motions to dismiss for failure to state a claim. *See* FED. R. CIV. P. 12(g) ("If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, *except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.*") (emphasis added). Rule 12(h)(2) expressly mentions a motion to dismiss for failure to state a claim.

Based on the foregoing authorities, the Court concludes that it is appropriate for it to proceed with consideration of defendants' motion under Rule 12(c) for those defendants that have answered the complaint and under Rule 12(b)(6) for those defendants that have not. The motion is not premature as to any defendant.

B. The Impact of Section 207

Defendants first argue that "Congress has now made clear through Section 207 that it is not unlawful under the antitrust laws to sponsor, conduct, or participate in the Match or to agree to sponsor, conduct or participate in the Match." Defs.' Mot. at 6. While that may be true, that alone is insufficient because plaintiffs do not allege in their complaint that the existence of and/or participation in the Match is a *per se* violation of the antitrust laws. Instead, plaintiffs argue that the Match, in combination with the dissemination of the COTH Survey and the enforcement of the ACGME accreditation standards, functions to suppress competition in resident hiring and compensation, resulting in depressed salaries and benefits. *See Jung* *v. Association of American Medical Colleges,* 300 F. Supp. 2d at 161-62, 167.[3] This is a critical distinction, because, as the Court noted in its February 11 Opinion and Order, if lawful acts are used as the means to effectuate an antitrust conspiracy, the conspiracy itself is still unlawful. *See id.* at 160-61. The Supreme Court has concluded that "[i]t is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition." *American Tobacco Co. v. United States,* 328 U.S. at 809. *See also Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. at 707 ("acts which are in and of themselves legal lose that character when they become constituent elements of an unlawful scheme."). Accordingly, congressional confirmation that the Match program or participation in the Match program does not constitute a *per se* violation of the antitrust laws in the substantive provision of Section 207 does not defeat plaintiffs' antitrust claim.

The second sentence of Section 207(b)(2) goes on to provide, however, that "[e]vidence of any of the conduct described in the preceding sentence shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws." 15 U.S.C. § 37b(b)(3).

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[3] Interestingly, in an effort to make out long-arm jurisdiction, plaintiffs did attempt to suggest at oral argument on defendants' motion to dismiss that the tortious injury (if not the antitrust injury) to plaintiffs was the Match itself but, in view of plaintiffs' complaint, the Court rejected the argument. *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 136.

Defendants argue that this provision prohibits plaintiffs from "us[ing] allegations related to the Match to support any antitrust claim, price-fixing or otherwise. Because plaintiffs' 'single' claim depends on evidence that defendant sponsored, conducted, or participated in the Match, Section 207 is fatal to their complaint, and it should be dismissed." Defs.' Mot. at 7. Plaintiffs respond to this charge in two ways.

First, plaintiffs argue that "[the February 11 Order and Opinion] upheld plaintiffs' price-fixing conspiracy claim without significant reliance on the allegations regarding the Match." Pls.' Opp. at 9-10. Accordingly, plaintiffs argue, the evidentiary prohibition does not defeat plaintiffs' claim. In support of this assertion, plaintiffs cite those portions of the February 11 Opinion in which the Court assessed the conspiracy claim as it relates to the AAMC and the ACGME and the allegations regarding the defendants' wage information and exchange and accreditation activities. *See id.* at 9. They argue that the Court focused not on the Match, but on the other prongs of the alleged conspiracy almost entirely. *See id.* at 9-10. In so arguing, however, plaintiffs fail to consider that the Court's conspiracy analysis entailed two steps, the first of which relied greatly on allegations related to the Match.

In considering the original Rule 12(b)(6) motions, the first question the Court asked was whether plaintiffs adequately had alleged that an antitrust conspiracy existed. In concluding that they had, the Court focused on the highly intertwined, three-pronged nature of the alleged conspiracy, and relied in large part on the primary role the Match allegations played in the conspiracy claim. *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 162 (concluding that "plaintiffs adequately have alleged a common agreement . . . among a number of the named organizational defendants *and those institutional defendants that participated in the Match Program*") (emphasis added). In the second prong of the Rule 12(b)(6) analysis the Court assessed whether plaintiffs had alleged adequately that the individual defendants participated in the conspiracy. While the Court did then focus on the allegations of the individual defendant at issue – in the case of the AAMC, the allegations concerning the COTH Survey; with respect to the ACGME, the allegations that related to that defendant's accreditation standards – such "individualized" analysis does not change the fact that the Court first had concluded that plaintiffs had alleged an intertwining three-pronged conspiracy with the Match at its core. Plaintiffs' assertion that the Court considered the claims of the AAMC and the ACGME without reference to the Match is simply incorrect.

Second, plaintiffs argue that "[e]ven without the Match allegations" the complaint satisfies "the three elements of a properly pleaded claim under Section 1 of the Sherman Act," Pls.' Opp. at 10-11, and that even without the Match-related allegations, the complaint still alleges a price-fixing conspiracy. *See id.* at 11. This argument is unsupported by the complaint that plaintiffs filed in this case, however. The complaint does not allege a price-fixing conspiracy but a single overarching integrated antitrust conspiracy with the Match as its centerpiece. *See* Compl. ¶¶ 3 (alleging three-pronged conspiracy), 58 (defendant class is defined in part by "all NRMP Institutional Participants"), 83-86 (alleging anticompetitive function of Match). Even the allegations that pertain to the ACGME accreditation standards rely in part on Match-related allegations. *See id.* ¶ 88(c) ("the ACGME encourages and/or requires participation in the NRMP as a condition of accreditation"). Plaintiffs' argument also is inconsistent with the Court's characterization of plaintiffs' claim in the February 11 Opinion and Order. *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 161-62; *see id.* at 166-67. In fact, plaintiff's current position is inconsistent with plaintiffs' own previous position as set forth in their earlier filings. In opposing NRMP's motion to compel arbitration, for example, plaintiffs asserted that they allege:

> a single, overarching conspiracy and the gravamen of plaintiffs' claim against NRMP is that it combined and conspired with others to displace competition in the market for resident services and to fix and stabilize residents' wages. The conspiracy which plaintiffs allege involves conduct significantly beyond particular features of the operation of the match program. While plaintiffs refer to certain conduct related to the operation of the match and its effects as *some evidence* of how the defendants carry out their overarching conspiracy to depress residents' wages, the complaint makes clear that the anticompetitive conduct related to the Match is not limited solely to the NRMP and that *the anticompetitive conduct related to the match necessarily interrelates with the other anticompetitive conduct alleged. . . .*

Plaintiffs' Consolidated Brief Opposing Defendants' Motion to Dismiss and to Compel Arbitration at 5 (underscore in original, italics added). *See also* Plaintiffs' Brief in Support of Their Motion for Certification of a Plaintiff Class and Certification of a Defendant Class at 2, 5.

Finally, while arguing with reference to the allegations related to the other two prongs of the alleged conspiracy that the conspiracy claim is legally sufficient without consideration of the Match-related claims, plaintiffs make no attempt to demonstrate that absent the Match allegations, the Court in fact would have come to the same conclusion that a conspiracy existed based solely on the remaining prongs. Moreover, the burden cannot be on the Court to effectively rewrite the complaint and consider it, as reconfigured, without the central Match-related allegations in order to evaluate plaintiffs' argument here.[4] While there may be a "tree . . . without the Match limb," Pls.' Opp. at 14-15, plaintiffs' conclusory argument does not convince the Court that it is so.[5] The Court concludes that the allegations concerning the Match and the institutional defendants' participation in the Match are so interdependent that the Court cannot separate them from the remaining allegations. Because Congress has prevented this or any other Federal court from considering evidence of Match-related conduct, the Court necessarily concludes that plaintiffs' complaint must be dismissed under 15 U.S.C. § 37b(b)(3).

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[4] Nor would such an endeavor by the Court be consistent with the February 11 Opinion and Order. *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 155 ("conspiracy allegations in antitrust cases cannot be compartmentalized and considered in isolation 'as if they were separate lawsuits, thereby overlooking the conspiracy claim itself' ") (quoting *In re Fine Paper Antitrust Litigation,* 685 F.2d 810, 822 (3d Cir. 1982)).

[5] The Court's dismissal of the AMA in the February 11 Opinion and Order is irrelevant. Plaintiffs argue that "the Order shows – indeed establishes as the law of this case – that legal failure of one component of defendants' alleged conspiracy may lead to the dismissal of any defendant only involved in that component, but does *not* lead to the dismissal of the defendants involved in the remaining components." Pls.' Opp. at 13 (emphasis in original). Plaintiffs base this argument on the Court's conclusion that the single allegation regarding the FREIDA database, in the absence of any other allegations relating to AMA participation in the conspiracy, "[did] not lend support to an inference that the AMA participated in the alleged conspiracy." *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 169. The allegations concerning the Match program, by contrast, permeate the complaint and, as the Court concluded, serve as a cornerstone of the conspiracy. *See id.* at 162.

C. *The "Savings" Clause*

Plaintiffs next argue that notwithstanding the "evidentiary" prohibition of Section 207, the clause exempting price-fixing claims preserves their complaint. Section 207 provides that "[n]othing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs." 15 U.S.C. § 37b(f). Plaintiffs interpret this clause to exclude from the antitrust exemption all claims that allege the price-fixing of resident wages, including their own. *See* Pls.' Opp. at 23. Plaintiffs construe this exclusion too broadly. Section 207 does not exclude all price-fixing claims related to resident compensation; it only excludes price-fixing claims that allege agreements between two or more institutional defendants to fix resident stipends and other benefits. There is a difference, and plaintiffs' complaint demonstrates that difference. Their pleading does not allege an agreement among residency programs to fix wages paid to residents. It alleges that an agreement exists between institutional defendants and numerous organizational defendants to suppress competition and depress compensation, and the allegations related to the organizational defendants – the Match Program, the AAMC dissemination of information, and the ACGME accreditation standards – comprise the heart of plaintiffs' claim. *See Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d at 161-62.

In an attempt to save their claim, plaintiffs also maintain that the Court must conclude that the savings clause is exempt from the evidentiary prohibition of Section 207, arguing that the restrictions on the admissibility of certain evidence in subsection (b)(2) cannot apply to price-fixing suits provided for in subsection (b)(3) because the subsection states that "nothing" in Section 207 shall provide exemptions from price-fixing claims. *See* Pls.' Opp. at 26. Again, plaintiffs misread the statute. Application of the evidentiary provision to the savings clause does not function to preclude the excepted price-fixing claims. Application of the provision merely forbids invocation of the Match program as evidence in any antitrust suit, including one involving allegations of price-fixing; but price-fixing claims unrelated to the Match as described in Section 207(b)(3) are not affected.

D. Constitutional Challenges to Section 207

Plaintiffs understandably are frustrated. They won a significant victory in court; Congress now has snatched it away. As a result, they have spent a significant portion of their brief discussing the "highly peculiar" legislative path Section 207 took before its passage. Pls' Opp. at 17. They point out that there were no hearings, no testimony, no significant debate, and vigorous opposition from those few Senators and Representatives who cared enough or were importuned enough to focus on the Match legislation. *See id.* at 16-22. "By furtively attaching the Match Legislation as a rider to an unrelated bill on the eve of imminent passage rather than introducing legislation through normal procedures, defendants were able to avoid public and Congressional awareness and avoid opposition to their scheme." *Id.* at 21. As Bismarck suggested, "the making of laws, like the making of sausage, is something from which the fastidious person would often be well advised to avert his or her gaze." *ACLU v. Capitol Square Review Advisory Board,* 243 F.3d 289, 309 n.21 (6th Cir. 2001); *Community Nutrition Institute v. Block,* 749 F.2d 50, 51 (D.C. Cir. 1984) (same). Absent a valid constitutional challenge to a law passed by Congress and signed by the President, however, the responsibility of the courts is to interpret and apply the statute, not to second-guess. *See Mistretta v. United States,* 488 U.S. 361, 384 (1989) ("When this Court is asked to invalidate a statutory provision that has been approved by both Houses of Congress and signed by the President, . . . it should only do so for the most compelling constitutional reasons.") (quoting *Bowsher v. Synar,* 478 U.S. 714, 736 (1986) (Stevens, J., concurring)); *Nuclear Energy Institute, Inc. v. EPA,* No. 01-1258, 2004 U.S. App. LEXIS 14186, *144 (D.C. Cir. July 9, 2004) ("Congress has settled the matter, and we, no less than the parties, are bound by its decision.").

Plaintiffs challenge the constitutionality of Section 207 on several grounds. Upon consideration of the parties' arguments, the Court concludes that none of plaintiffs' arguments saves plaintiffs' conspiracy claim.

1. Separation of Powers

Plaintiffs charge that interpreting Section 207 to require disposition of this action in defendants' favor would amount to "a legislative adjudication of this pending case" in violation of "bedrock separation of powers principles" because "Congress may not . . . direct decisions in pending cases." Pls.' Opp. at 28. Plaintiffs rely primarily on the Supreme Court's decision in *United States v. Klein*, 80 U.S. 128 (1871). *Klein* concerned a suit seeking proceeds from cotton seized from a Confederate sympathizer and sold by the Union army during the Civil War. The petitioner filed the suit pursuant to a federal statute that allowed recovery of seized property by owners if they provided proof of loyalty to the Union, which loyalty, the Court previously had determined, could be proven by evidence of a presidential pardon of the owner for any support he offered to the Southern rebellion. *See id.* at 142-43. The owner of the cotton had received such a pardon. After petitioner had recovered in the Court of Claims, however, Congress passed another statute that precluded the use of any pardons given to those who participated in the rebellion to demonstrate proof of loyalty, and provided that acceptance of such a pardon in fact demonstrated *dis*loyalty. Congress also directed that upon presentation of proof of such a pardon, the Court of Claims and the Supreme Court must dismiss the property claim for want of jurisdiction. *See id.* at 143-44.

The Supreme Court found the statute unconstitutional in two respects. First, the Court determined that Congress is prohibited from "prescrib[ing] a rule for the decision of a cause in a particular way" in cases "pending before [the Judicial department of the government]." *United States v. Klein*, 80 U.S. at 146. As noted, the Court of Claims had already rendered judgment for the claimant, and an appeal had been taken to the Supreme Court. The Supreme Court found the statute at issue unconstitutional because it had the effect of forbidding the Supreme Court (and for the future, the Court of Claims) from "giv[ing] effect to the evidence which, in [the Court's] judgment, such evidence should have, and . . . direct[ing it] to give it an effect precisely [to] the contrary." *Id.* at 147. In so concluding, the Court distinguished those cases in which "new circumstances" are created under the statute that have the effect of determining the outcome of the case. *Id.* Second, the statute impaired the effect of the Presidential pardon and therefore infringed upon the constitutional power of the Executive. It was clear to the Supreme Court that "the legislature cannot change the effect of such a pardon any more than the executive can change a law [passed by the legislature]." *Id.* at 147-48.[6]

Plaintiffs argue that the evidentiary prohibition enacted by Congress with respect to the Match cannot stand under *Klein* because Congress "may not constitutionally assume the judicial function of determining the effect or weight to be given to evidence in a pending case" by altering the rules of decision such that the alteration directs disposition of the action in defendants' favor. *See* Pls. Opp. at 32.[7] As the D.C. Circuit has noted, "*Klein*'s exact meaning is far from clear." *National Coalition to Save Our Mall v. Norton,* 269 F.3d 1092, 1096 (D.C. Cir. 2001). One thing is certain, however, and that is that "[w]hatever the precise scope of *Klein* . . . later decisions have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 218 (1995). When "a statute 'compels changes in the law, not findings or results under old law,' it merely amends the underlying law, and therefore is not subject to a *Klein* challenge." *Imprisoned Citizens Union v. Prasse,* 169 U.S. 178, 187 (3d Cir. 1999) (quoting *Robertson v. Seattle Audubon Society,* 503 U.S. 429, 438 (1992)). *See also Benjamin v. Jacobson,* 124 F.3d 162, 174 (2d Cir. 1997) ("if legislation can be characterized as changing the underlying law rather than as prescribing a different outcome under pre-existing law, it will not violate the separation of powers principle formulated in *Klein*").

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[6] As later explained by the Supreme Court, the statute at issue in *Klein* was unconstitutional in two respects: First, "it prescribed a rule of decision in a case pending before the courts, and did so in a manner that required the courts to decide a controversy in the Government's favor." Second, the statute infringed the constitutional power of the President to issue pardons. *United States v. Sioux Nation of Indians,* 448 U.S. 371, 404-05 (1980).

[7] Plaintiffs also argue that interpreting the substantive provision of Section 207 to require the disposition of this lawsuit in defendants' favor is unconstitutional. See Pls. Opp. at 30-31. In light of the Court's conclusion that Section 207 by its own terms does not direct judgment for defendants, *see* Section II.B, *supra,* the Court does not reach this argument.

The Court concludes that by enacting the statute Congress changed the scope of permissible antitrust claims that may be resolved by the Federal courts. Congress exempted from antitrust prosecution all claims that directly challenge the legality of the Match and participation in the Match program by institutional defendants under the antitrust laws, and prohibited the use in antitrust actions of evidence concerning the Match Program and its participants. The plain language of the statute add a new antitrust exemption to the antitrust laws and new procedural or evidentiary restrictions on the prosecution of certain antitrust actions. *See* 15 U.S.C. § 37b(b)(2).[8] This

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[8] Despite arguments to the contrary, the statute is not merely a confirmation of prior existing law, the titles of Section 207, "Confirmation

(Continued on following page)

change in or amendment to applicable antitrust law does not, however, prescribe a different finding, conclusion or result in the outcome of this or any other particular antitrust case. It therefore does not run afoul of *Klein*.

The line between a statute that provides the standard to which courts must adhere and a statute that compels a specific result in a pending action at times is difficult to draw. *See Benjamin v. Jacobson*, 124 F.3d at 174 ("The distinction may in some cases be hard to discern."); *Axel Johnson Inc. v. Arthur Andersen & Co.*, 6 F.3d 78, 81 (2d Cir. 1993) ("The conceptual line between a valid legislative change in law and an invalid act of adjudication is often difficult to draw."). In this case, however, the line is clear, and the fact that Section 207 has application to actions beyond this lawsuit only bolsters the Court's conclusion that the statute was amended. Section 207 precludes both claims challenging the antitrust status of the Match Program itself, and the consideration of evidence related to the Match Program in actions brought under the antitrust laws. Accordingly, the Court concludes that plaintiffs can find no refuge in *Klein* and its articulation of the separation of powers doctrine.

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of Antitrust Status of Graduate Medical Resident Matching Programs," and of subsection (b)(2), "Confirmation of Antitrust Status," and the articulated purpose of subsection (a)(2)(A) notwithstanding. "The title of a statute '[is] of use only when [it] sheds light on some ambiguous word or phrase' in the statute itself." *Carter v. United States*, 530 U.S. 255, 267 (2000) (quoting *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (internal quotation omitted)) (brackets in original). Here, the statute is unambiguous.

2. Unconstitutional Taking

Plaintiffs next argue that dismissal of their complaint under the evidentiary prohibition of Section 207 would constitute an unlawful taking in violation of the Fifth Amendment. Specifically, plaintiffs argue that with dismissal they will lose their property interest in their future wages and working conditions. *See* Pls.' Opp. at 36. These lost increased wages and bettered working conditions can only be considered "lost," however, if plaintiffs succeed in this action and wages in fact are increased. Otherwise, there is no basis on which to assume that compensation would increase in the future. The court of appeals has made it clear that plaintiffs have no property interest in their pending claim. Causes of actions only become actionable property interests upon the entry of final judgment. *Adams v. Hinchman*, 154 F.3d 420, 424 (D.C. Cir. 1998) (a cause of action "affords no definite or enforceable property right until reduced to a final judgment"); *Grimesy v. Huff*, 876 F.2d 738, 744 (9th Cir. 1989) ("a party's property right in any cause of action does not rest until a final *unreviewable* judgment is obtained.") (internal quotations and citation omitted) (emphasis in original). Similarly, to the extent that plaintiffs implicitly assert that dismissal of their complaint would constitute a taking in the form of past wage loss stemming from defendants' anticompetitive behavior, those asserted losses likewise are compensable, if at all, only upon entry of a final judgment.

3. Additional Constitutional Arguments

Plaintiffs also argue that dismissal of their antitrust claim through the evidentiary restriction of Section 207 would violate their right to due process, their right to access to the courts and their right to equal protection of the laws. Plaintiffs first raise a due process claim under *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), asserting that "exclusion of this concededly relevant evidence would result in summary dismissal of plaintiffs' entire claim at the *pleading* stage," thereby denying them the right to adjudication on the merits. Pls.' Opp. at 33 (emphasis in original). The Supreme Court in *Logan* did not conclude that litigants have a due process right to an adjudication on the merits, however. Instead, the Court concluded that it was a denial of due process to create a cause of action in which parties have a property right and then to allow the state to take that right away without providing the party with any judicial forum. *See id.* at 429-30. This case does not present the same situation, and plaintiffs' reliance on *Logan* therefore is misplaced. Section 207 does not deny plaintiffs a forum in which to bring their claim. Instead, the statute restricts the basis for an antitrust cause of action, which is not an unconstitutional restriction so long as there is a rational basis for the law, as the Court discusses, *infra* at Section II.D.3.

Plaintiffs similarly argue that the evidentiary prohibition unconstitutionally prescribes their right to access to the courts under the First Amendment. The constitutional right of access is predicated on the existence of an underlying claim, however. If the cause of action no longer exists, the right to access cannot save the claim. As the Supreme Court concluded in *Christopher v. Harbury*, 536 U.S. 403 (2002):

> Whether an access claim turns on a litigating opportunity yet tc be gained or an opportunity already lost, the very point of recognizing any access claim is to provide some effective vindication for a separate and distinct right to seek judicial

> relief for some wrong. However unsettled the basis of the constitutional right of access to courts, our cases rest on the recognition that the right is ancillary to the underlying claim, without which a plaintiff cannot have suffered injury by being shut out of court.

Id. at 414-15. Here, plaintiffs assert that dismissal of the complaint under Section 207 effectively denies plaintiffs access to the courts to adjudicate their claim. A more proper construction of the effect of the statute is that it effectively eliminates the cause of action in the first instance. Plaintiffs' "access to the courts" argument therefore is misplaced. Whether the congressional act was constitutional is a separate question, to be discussed, *infra* at Section II.D.3.

Plaintiffs next argue that the evidentiary prohibition fails to comport with due process because "a special evidentiary rule that applies only to litigants who seek to include in their cases evidence relating to a matching program – one that applies regardless of the merit of those litigants' claims – is an archetype of irrational legislation." Pls.' Opp. at 36. As a preliminary matter, the Court notes that there is a "strong deference accorded legislation in the field of national economic policy," *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.,* 467 U.S. 717, 729 (1984), and "Congress has considerable leeway to fashion economic legislation." *Eastern Enterprises v. Apfel,* 524 U.S. 498, 528 (1998). As the Supreme Court has concluded, "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Eastern*

Enterprises v. Apfel, 524 U.S. at 524 (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)). Accordingly, the Court must assess whether the Congress acted in an arbitrary and irrational way in enacting the evidentiary prohibition of Section 207. Upon review of the policies expressly articulated in the statute, the Court concludes that it did not.

Subsection (a) of Section 207 articulates the congressional findings, purposes and intent justifying the exclusion of the Match Program and participation in the Match from the purview of the antitrust laws, both in actions against the program and its participants and in actions that more generally seek to demonstrate violation of the antitrust laws by making allegations concerning the Match. The subsection first references the historical impetus for the creation of the Match, which include a desire for efficiency, for fairness and for protection of students' early years of medical school. See 15 U.S.C. § 37b(a)(1)(A)-(D). The statute then provides:

> Antitrust lawsuits challenging the matching process, regardless of their merit or lack thereof, have the potential to undermine this highly efficient, pro-competitive, and long-standing process. The costs of defending such litigation would divert the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research. In addition, such costs may lead to abandonment of the matching process, which has effectively served the interests of medical students, teaching hospitals, and patients for over half a century.

15 U.S.C. § 37b(a)(1)(E). The intent behind the enactment of Section 207 was to secure the continuation of the Match

itself, which Congress found is an efficient, valuable placement system, and to protect the financial resources of teaching hospitals and programs from costs of antitrust litigation that concern the Match program. The Court cannot conclude that this protection, effectuated by exempting the Match or its participants from antitrust prosecution, is an irrational or arbitrary act on the part of Congress.

Furthermore, if Congress's specific intent was to prevent use of funds in lawsuits that challenge the Match either directly or indirectly under the antitrust laws, the evidentiary prohibition is a rational means of actualizing that protection of resources. The fact that application of the statute effectively will end this litigation does not make the law irrational or arbitrary. *See National Coalition to Save Our Mall v. Norton,* 269 F.3d at 1097 (Congress may enact legislation that affects pending actions so long as it does so by amending the relevant law); *Deck v. Peter Romein's Sons, Inc.,* 109 F.3d 383, 386 (7th Cir. 1997) ("Congress' power to effect a change in the law and to make that change controlling as to pending cases is beyond peradventure."); *National Juvenile Law Center, Inc. v. Regnery,* 738 F.2d 455, 465 (D.C. Cir. 1984) ("Pending cases are often affected by the actions of coordinate branches of government. For instance, the general rule is that, if Congress changes the law while a case is pending, the courts are obligated to apply the law as they find it at the time of judgment (including appellate judgment).").

This reasoning also disposes of any additional argument that retroactive application of the statute to this action violates plaintiffs' due process rights. It cannot be disputed that Congress intended that Section 207 apply to this action. *See* 15 U.S.C. § 37b(c) ("[t]his section . . . shall apply to all judicial and administrative actions or other proceedings pending on [the] date of enactment"). The Court therefore must ask whether "the retroactive application of a statute [is] supported by a legitimate legislative purpose furthered by rational means." *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. at 729. The policies articulated by Congress in Section 207(a) ("Findings and Purposes") provide the bases for the conclusion that retroactive application of the statute is a rational means to effect these purposes. With Section 207, Congress intended to protect the Match Program and its participants from the cost of defending antitrust actions that challenge the Match. Clearly, this lawsuit is such an action, and application of the statute to this action accomplishes Congress's goal of conserving the resources of the medical education community. While plaintiffs disagree with many of the "findings" of Congress, particularly because they were made without the benefit of any congressional hearings, *see supra* at Section II.D, and question the policies underlying the statute, the findings themselves are not irrational and there is a rational connection between the findings made and the policies enacted. *See Hammond v. United States*, 786 F.2d 8, 13 (1st Cir. 1986) (plaintiff has not met burden of showing that statute is "arbitrary and irrational in purpose and effect" and not "reasonably related to a legitimate congressional purpose").

Plaintiffs raise a similar claim that Section 207 violates their equal protection rights. As the Supreme Court provided in *FCC v. Beach Communications, Inc.*, 508 U.S. 307 (1993), however, "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. . . . Where there are 'plausible reasons' for Congress' action, 'our inquiry is at an end.'" *Id.* at 313 (internal quotations and citations omitted). In the absence of any argument that plaintiffs are members of a suspect class or that their claim asserts infringement of a constitutional right, plaintiffs' equal protection argument fails on the same basis as did their due process claim. *See Calloway v. District of Columbia,* 216 F.3d 1, 8-9 (D.C. Cir. 2000) (where plaintiffs are not members of suspect class, equal protection challenge is reviewed under rational basis standard); *Hammond v. United States,* 786 F.2d at 15 (failing to allege a suspect class, plaintiffs' equal protection argument fails on same basis as due process analysis). And "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' . . . [C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller v. Doe,* 509 U.S. 312, 319, 321 (1993) (quoting *FCC v. Beach Communications, Inc.,* 508 U.S. at 318).

III. CONCLUSION

For the foregoing reasons, in view of the enactment of Section 207 by Congress, the Court concludes that with respect to the 14 defendants that have filed answers it must grant their motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure, and, with respect to the remaining 15 movants it must treat their motion as a motion for failure to state a claim under Rule 12(b)(6) and grant that motion. The Court will deny all other pending motions as moot.[9] A separate Order consistent with this Opinion will issue this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE:

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[9] Had the Court not granted the instant motion, it would have granted the motion of certain defendants to certify an immediate appeal under 28 U.S.C. § 1292(b).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D., et al.,)
Plaintiffs,)
v.) Civil Action No. 02-0873 (PLF)
ASSOCIATION OF AMERICAN MEDICAL COLLEGES, et al.,)
Defendants.)

ORDER AND JUDGMENT

(Filed Aug. 12, 2004)

For the reasons stated in the separate Opinion issued this same day, it is hereby

ORDERED that the motion for judgment on the pleadings under Rule 12(c) of the Federal Rules of Civil Procedure is GRANTED with respect to the 14 defendants that have filed answers; it is

FURTHER ORDERED that with respect to the remaining 15 movants that have not yet filed answers, the motion for judgment on the pleadings shall be treated as a motion to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure, and it is GRANTED; it is

FURTHER ORDERED that defendant National Resident Matching Program's motion to strike plaintiffs' statement is DENIED as moot; it is

FURTHER ORDERED that defendant National Resident Matching Program's motion to strike plaintiffs' response opposing defendant NRMP's motion for protective order is DENIED as moot; it is

FURTHER ORDERED that the consent motion for entry of a stipulated order on experts' discovery is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion for class certification is DENIED as moot; it is

FURTHER ORDERED that defendants' motion to compel class discovery is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion to amend or correct order staying class discovery is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion for a protective order is DENIED as moot;

FURTHER ORDERED that plaintiffs' amended motion for class certification is DENIED as moot; it is

FURTHER ORDERED that defendant National Resident Matching Program's motion to stay proceedings pending appeal is DENIED as moot; it is

FURTHER ORDERED that certain defendants' motion for a certificate of appealability is DENIED as moot; it is

FURTHER ORDERED that defendants' motion to stay proceedings pending appeal is DENIED as moot; it is

FURTHER ORDERED that plaintiffs' motion to amend the complaint is DENIED as moot; it is

FURTHER ORDERED that certain defendants' motion to reconsider the Rule 12(b)(2) jurisdiction ruling is DENIED as moot; it is

FURTHER ORDERED that judgment on the pleadings is entered for defendants and the case is DISMISSED for failure to state a claim; and it is

FURTHER ORDERED that this Order and Judgment shall constitute a FINAL JUDGMENT in this case. This is a final appealable order. *See* Rule 4(a), Fed. R. App. P.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE:

226 F.R.D. 7

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D., *et al.*, Plaintiffs, v. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *et al.*, Defendants.	)	Civil Action No. 02-0873(PLF)

MEMORANDUM OPINION AND ORDER

(Filed Jan. 25, 2005)

On August 12, 2004, this Court entered judgment for the fourteen defendants who had filed answers and dismissed plaintiffs' claims against the remaining fifteen movants pursuant to Rule 12(b)(6). This ruling was in response to the recent enactment by Congress and subsequent signing into law by President George W. Bush of the Pension Funding Equity Act of 2004, Pub. L. No. 108-218, 118 Stat. 596 (2004), which includes a provision entitled "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs," an amendment to the antitrust laws that has been codified as 15 U.S.C. § 37b ("Match legislation"). *See Jung v. Association of American Medical Colleges,* 339 F. Supp. 2d 26 (D.D.C.2004).

Plaintiffs have filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure requesting that the Court "alter or amend its judgment to render the dismissal of plaintiffs' complaint without prejudice and non-final in order to permit the plaintiffs to file an amended complaint asserting antitrust claims based on defendants' activities other than the Match, including the defendants' information exchanges and wage-restrictive accreditation rules, policies and procedures." *See* Plaintiffs' Rule 59(e) Motion to Alter or Amend the Judgment and Rule 15(a) Motion for Leave to Amend Their Complaint ("Mot.") at 1. Upon consideration of plaintiffs' motion, defendants' opposition, plaintiffs' reply, defendants' surreply and plaintiffs' sur-surreply, the Court concludes that plaintiffs' motion should be denied.

"[O]nce a final judgment has been entered, a court cannot permit an amendment [of the complaint under Rule 15(a) of the Federal Rules of Civil Procedure] unless the plaintiff 'first satisfies Rule 59(e)'s more stringent standard' for setting aside that judgment.'" *Ciralsky v. CIA,* 355 F. 3d 661, 673 (D.C. Cir. 2004) (quoting *Firestone v. Firestone,* 76 F. 3d 1205, 1208 (D.C. Cir. 1996)). Rule 59(e) motions "are disfavored and relief from judgment is granted only when the moving party establishes extraordinary circumstances." *Niedermeier v. Office of Max S. Baucus,* 153 F. Supp. 2d 23, 28 (D.D.C. 2001). "A motion to alter or amend a judgment under Rule 59(e) . . . will not be granted unless there is an 'intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" *Koch v. McPhie,* Civil Action No. 01-0875, 2004 U.S. Dist. LEXIS 14315, *1-2 (D.D.C. July 1, 2004) (quoting *Firestone v. Firestone,* 76 F. 3d at 1208). "Rule 59(e) motions 'may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment.'" *Niedermeier v. Office of Max S. Baucus,* 153 F. Supp. 2d at 28 (quoting 11 CHARLES ALAN

WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2810.1 (2d ed. 1995)).

Defendants argue that "[p]laintiffs do not suggest that the Court committed 'clear error' in entering judgment against them, that new evidence became available after judgment was entered, or that a change in controlling law warrants reconsideration of the Court's conclusions." *See* Defendants' Opposition to Plaintiffs' Rule 59(e) Motion to Alter or Amend Judgment and Rule 15(a) Motion for Leave to File Amended Complaint ("Opp.") at 2. Plaintiffs' reply clarifies their position that the Rule 59(e) motion should be granted because (a) the Match legislation was a change in controlling law, and (b) plaintiffs will suffer "manifest injustice" if the motion for reconsideration is not granted.[1]

Although the Court agrees with plaintiffs that the Match legislation is a "change in controlling law," that change took place in April of 2004, several months before the Court issued its August 2004 Opinion entering judgment for certain defendants and dismissing the case with respect to the remainder. Plaintiffs had both the time and the opportunity to request leave to amend their complaint prior to the Court's entry of judgment, but chose not to. "It is well established that plaintiff[s] cannot resuscitate [their] case post-dismissal by [filing a Rule 59(e) motion] alleging facts or legal theories that were available to [them] at the inception of the case," or "that could have been raised prior to the entry of judgment." *Niedermeier v. Office of Max S. Baucus,* 153 F. Supp. 2d at 28. Likewise, plaintiffs' claim of "manifest injustice" fails to meet the burden required under Rule 59(e). Plaintiffs were well aware of the Match legislation and of the bases for defendants' motion for judgment on the pleadings before entry of judgment and cannot now claim that an adverse ruling resulting from the grant of defendants' motion based on that legislation worked a manifest injustice on them. Because the Court concludes that plaintiffs have not satisfied the stringent standard for relief under Rule 59(e), plaintiffs' motion to alter or amend the judgment must be denied. Plaintiffs' motion to amend their complaint therefore is moot. *See Ciralsky v. CIA,* 355 F. 3d at 673.

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[1] Defendants also argue that plaintiffs' motion should be denied because plaintiffs withdrew their original argument in their reply and put forward two new arguments instead. Defendants therefore maintain that plaintiffs' arguments are untimely under Rule 59(e). Because the Court finds plaintiffs' arguments unpersuasive, there is no reason to decide this question.

Even if the Court had found that plaintiffs satisfied the heavy burden for relief under Rule 59(e), the Court still would have denied plaintiffs' motion to amend their complaint. Plaintiffs correctly point out that leave to file an amended complaint should be "freely given when justice so requires." Mot. at 4 (quoting FED. R. CIV. P. 15(a)). The Court, however, may deny leave if the party opposing the motion can provide a good reason why the amendment should not be allowed, including the clear futility of permitting the amendment. *See Foman v. Davis,* 371 U.S. 178, 182 (1962); *Willoughby v. Potomac Electric Power Co.,* 100 F. 3d 999, 1003 (D.C.Cir.1996). An amendment is futile if it would not survive a motion to dismiss or for judgment on the pleadings. *See Willoughby v. Potomac Electric Power Co.,* 100 F. 3d at 1003; *Stith v. Chadbourne & Parke, LLP,* 160 F. Supp. 2d 1, 6 (D.D.C.2001).

Contrary to plaintiffs' assertion, the Match was an essential and integral part of this Court's February 11, 2004 ruling and of plaintiffs' claims. This Court already has stated that plaintiffs' current position that they can maintain a price-fixing conspiracy even without the Match-related allegations "is inconsistent with plaintiffs' own previous position as set forth in their earlier filings" and with this Court's decision. *See Jung v. Association of American Medical Colleges,* 339 F. Supp. 2d at 38. As the Court noted then, plaintiffs themselves argued in their consolidated brief opposing defendants' motion to dismiss and to compel arbitration that "the anticompetitive conduct related to the match necessarily interrelates with the other anticompetitive conduct alleged." *Id.* The Court concluded in August 2004 that

> the allegations concerning the Match and the institutional defendants' participation in the Match are so interdependent that the Court cannot separate them from the remaining allegations. Because Congress has prevented this or any other Federal court from considering evidence of Match-related conduct, the Court necessarily concludes that plaintiffs' complaint must be dismissed under 15 U.S.C. § 37b(b)(2).

Id. at 39. The proffered amended complaint cannot save plaintiffs from this analysis and the actions of Congress.

Moreover, as defendants point out, if plaintiffs were permitted, by amending their complaint, to "remove[ ] the unifying element of the Match, what is left is a sprawling, 1000-institution conspiracy," which would present significant problems "in terms of issues of personal jurisdiction, class certification, liability, impact and damages." Opp. at 10. This is most certainly true in the context of personal jurisdiction. In its February 11, 2004 Opinion, this Court found the sole basis for personal jurisdiction to be long-arm jurisdiction based on a specific conspiracy, namely "a conspiracy to depress resident compensation between, *inter alia,* those institutional defendants that have participated in the Match and the [National Resident Matching Program]." *Jung v. Association of American Medical Colleges,* 300 F. Supp. 2d 119, 142 (D.D.C. 2004). Plaintiffs now seek to argue that they can establish a conspiracy absent any evidence of Match-related activity, the very activity on which the Court relied to find that conspiracy jurisdiction existed. The Court finds such an argument to be meritless, both with respect to the conspiracy claim and conspiracy as the basis for personal jurisdiction. Thus, to permit the amendment of the complaint would be a futile action, inasmuch as a renewed motion to dismiss or for judgment on the pleadings would necessarily be granted.

For the foregoing reasons, it is hereby

ORDERED that plaintiffs' Rule 59(e) Motion to Alter or Amend the Judgment and Rule 15(a) Motion for Leave to Amend Their Complaint [282] is DENIED.

SO ORDERED.

/s/
PAUL L. FRIEDMAN
United States District Judge

DATE: January 25, 2005

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300 F. Supp. 2d 119

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D., et al.,	)	
	)	
Plaintiffs,	)	
v.	)	Civil Action No. 02-0873 (PLF)
	)	
ASSOCIATION OF AMERICAN MEDICAL COOLEGES, et al.,	)	
Defendants.	)	

OPINION

(Filed Feb. 11, 2004)

Plaintiffs in this putative class action are medical school graduates currently or formerly enrolled in resident physician "residency" programs. The defendants can be categorized into two groups: the organizational defendants (organizations and associations that participate in the administration of graduate medical education in the United States) and the institutional defendants (universities, medical schools, foundations, hospitals, health systems and medical centers that sponsor medical residency programs). The defendants have filed three types of motions to dismiss: (1) motions to dismiss for lack of personal jurisdiction; (2) motions to dismiss for lack of subject matter jurisdiction and to compel arbitration; and (3) motions to dismiss for failure to state a claim upon which relief can be granted.

I. BACKGROUND

Plaintiffs filed suit charging that the defendants have violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Plaintiffs allege that the defendants have contracted, combined and conspired among themselves to "displace competition in the recruitment, hiring, employment and compensation of resident physicians, and to impose a scheme of restraints which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment." Complaint ("Compl.") ¶ 2. Plaintiffs assert that there are three intertwining prongs to the antitrust conspiracy.

The first prong of the alleged conspiracy concerns the annual assignment of fourth-year medical students to the institutional defendants' residency programs by the National Resident Matching Program ("NRMP"). The NRMP, an Illinois not-for-profit corporation, is managed and operated by defendant American Association of Medical Colleges ("AAMC") from AAMC's principal office in Washington, D.C. *See* Compl. ¶ 15. The AAMC also is an Illinois not-for-profit corporation, whose membership includes all 125 accredited medical schools, including those medical schools named in the complaint, and approximately 375 major teaching hospitals and health systems, some of which also are named in the complaint. These hospitals and health systems are member hospitals of a subsection of the AAMC, the Council of Teaching Hospitals and Health Systems ("COTH") Section. *See id.* ¶ 17.

Plaintiffs allege that in order to effectuate the assignment, or the "Match," as it is commonly called, prospective medical residents enter into contracts with and submit to the NRMP a ranked list of desired medical resident positions with various institutions ("Student Match Contract"). The institutions themselves also enter into contracts with the NRMP and submit ranked lists of the medical students whom they are interested in hiring ("Institutional Match Contract"). On a date certain, the NRMP through an algorithm "matches" the students' lists against the institutions' rankings, resulting in the assignment of each prospective medical resident to one residency program. *See* Compl. ¶¶ 15, 83-86. Plaintiffs allege that this system eliminates a free and competitive market and substitutes a centralized, anticompetitive allocation system that assigns prospective resident physicians to a single, specific and mandatory residency program. Plaintiffs further allege that defendants designed and implemented this system and collectively agree to comply with it in violation of the antitrust laws. *See id.* ¶ 83.

Several specific features of this assignment system allegedly serve to impose anticompetitive restraints on medical residency hiring. Plaintiffs allege that a medical student is required to enter into the Match if he or she wishes to gain employment in a residency program accredited by the Accreditation Council for Graduate Medical Education ("ACGME"). *See* Compl. ¶ 71. An individual's participation in an ACGME-accredited residency program in turn is allegedly a prerequisite for specialty certification upon completion of the residency by a member board of defendant American Board of Medical Specialties ("ABMS"), an Illinois not-for-profit corporation consisting of 24 recognized medical specialty certification boards. *See id.* ¶¶ 20, 69. Plaintiffs allege that eventual specialty certification by an ABMS board is considered critical to prospective residents inasmuch as they desire to be "certified" to practice within a specialty following the completion of their residencies. The practical effect of this structure, plaintiffs charge, is that the vast majority of medical students are compelled to participate in the Match, which is a substitute for all aspects of competitive individual negotiations and requires applicants to commit contractually to any assigned position as a condition of enrolling in the Match Program. *See id.* ¶¶ 69, 86. Furthermore, certain implementing policing mechanisms of the Match allegedly compel compliance with the foregoing restraints. These alleged mechanisms include the requirement that program participants immediately report suspected policy violations to the NRMP and advise the relevant organizational authorities of institution or resident physician violations. *See id.* ¶ 86(c).

In the second prong of the conspiracy, plaintiffs assert that certain aspects of the aforementioned ACGME accreditation standards, with which the institutional defendants allegedly voluntarily comply, function to further restrict residency employment. Specifically, plaintiffs allege that the ACGME (1) has the authority to regulate the number of employment positions in a residency program; (2) imposes substantial obstacles to the ability of a resident to transfer employment from one employer to another during the period of a residency, thereby effectively making NRMP assignments permanent for the duration of a residency; (3) encourages and/or requires participation in the Match by an institution as a condition of accreditation; and (4) directly reviews compensation and other terms of employment with the purposes of fixing and depressing them. *See* Compl. ¶ 88.

The third prong of the conspiracy concerns the exchange by defendants of information on resident compensation and other terms of employment through surveys and databases that plaintiffs allege has the purpose and effect of standardizing and stabilizing compensation and other terms of employment. *See* Compl. ¶¶ 73-82. This exchange allegedly occurs in two ways. First, the AAMC annually surveys members of its COTH Section seeking compensation levels for the employment year, aggregates the results into various categories and distributes its findings in an annual report (the "COTH Survey" or "Survey"). *See id.* ¶¶ 74-79. Second, hospitals and health systems access similar information through an electronic database known as the Fellowship and Residency Electronic Interactive Database ("FREIDA"), which is maintained by defendant American Medical Association ("AMA"). *See id.* ¶ 80. Plaintiffs allege that this exchange of information allows institutional defendants to fix resident salaries and benefits each year at depressed, anticompetitive levels.

Plaintiffs charge that the execution of the Match program, the enforcement of the ACGME-accreditation standards, and the coordinated collection and distribution of residency program compensation information together produce a significant depression of residents' salaries and working conditions by removing residents' ability to achieve enhanced salaries and working conditions through competition. *See* Compl. ¶¶ 92-96. Plaintiffs allege that defendants have violated Section 1 of the Sherman Act by contracting, combining and conspiring to unreasonably restrain trade and commerce. Plaintiffs filed this antitrust action as a proposed class action and have moved to certify both plaintiff and defendant classes. *See* Motion for Class Certification, filed November 3, 2003.

II. DEFENDANTS' RULE 12(b)(2) MOTIONS TO DISMISS FOR LACK OF PERSONAL JURISDICTION

A. *Rule 12(b)(2) Motions to Dismiss*

Sixteen institutional defendants and two organizational defendants, the ABMS and the Council of Medical Specialty Societies ("CMSS"), filed motions to dismiss for lack of personal jurisdiction under Rule 12(b)(2) of the Federal Rules of Civil Procedure.[1] Plaintiffs argue that the Court has jurisdiction over these non-resident defendants on three separate bases: (1) jurisdiction under the District of Columbia long-arm statute; (2) jurisdiction under Section 12 of the Clayton Act, 15 U.S.C. § 22; and (3) jurisdiction pursuant to the long-arm statute under the "conspiracy jurisdiction" doctrine.

It is undisputed that plaintiffs bear the burden of establishing personal jurisdiction over each individual defendant and that in order to meet their burden, plaintiffs cannot rely on conclusory allegations. *See GTE New Media Services Inc. v. Ameritech Corp.*, 21 F. Supp. 2d 27, 36 (D.D.C. 1998), *remanded on other grounds sub nom, GTE New Media Services Inc. v. BellSouth Corp.*, 199 F.3d 1343 (D.C. Cir. 2000). Nor can plaintiffs aggregate factual allegations concerning multiple defendants in order to demonstrate personal jurisdiction over any individual defendant. *See Rush v. Savchuk,* 444 U.S. 320, 331-32 (1980) (rejecting aggregation of co-defendants' forum contacts in determining personal jurisdiction because "the requirements of *International Shoe* must be met as to each defendant over whom a state court exercises jurisdiction"). In evaluating whether plaintiffs have established personal jurisdiction, the Court need not treat all of plaintiffs' allegations as true but instead "may receive and weigh affidavits and other relevant matter to assist in determining the jurisdictional facts." *United States v. Philip Morris Inc.,* 116 F. Supp. 2d 116, 120 n.4 (D.D.C. 2000).

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[1] The institutional defendants that have moved to dismiss the complaint for lack of personal jurisdiction are Barnes Jewish-Hospital, Baylor College of Medicine, Beth Israel Deaconess Medical Center, Inc., Boston Medical Center Corp., Cedars-Sinai Medical Center, The Cleveland Clinic Foundation, Emory University, Rhode Island Hospital, Rush-Presbyterian-St. Luke's Medical Center, St. Louis University, Stanford Hospital & Clinics, Thomas Jefferson University Hospital, Inc., Administrators of the Tulane Educational Fund, University Hospitals of Cleveland, Inc., Washington University Medical Center and Yale-New Haven Hospital, Inc.

In this instance, plaintiffs bear a special, higher burden in order to demonstrate jurisdiction because the parties have engaged in jurisdictional discovery. "[A]lthough ordinarily a plaintiff need only establish a *prima facie* case that personal jurisdiction exists to survive a motion to dismiss, ... in situations where the parties are permitted to conduct discovery on the jurisdictional issue a plaintiff must prove personal jurisdiction by a preponderance of the evidence." *Shapiro Lifschitz & Schram, P.C. v. Hazard,* 24 F. Supp. 2d 66, 69 (D.D.C. 1998). *See also In re Vitamins Antitrust Litigation,* 270 F. Supp. 2d 15, 20 (D.D.C. 2003) (citing *In re Vitamins Antitrust Litigation,* Misc. No. 99-0197, 2001 U.S. Dist. LEXIS 25073, at *22 (D.D.C. Oct. 21, 2001)) ("Because plaintiffs have conducted jurisdictional discovery, they must establish personal jurisdiction over defendants by a preponderance of the evidence.").

B. *Section 13-423(a): The District of Columbia Long-Arm Statute*

Plaintiffs assert that the Court has personal jurisdiction over the moving defendants under three separate subsections of the District of Columbia long-arm statute, Sections 13-423(a)(1), (3) and (4). While the long-arm statute is interpreted broadly and factual disputes are resolved in favor of plaintiffs, plaintiffs must allege some specific facts evidencing purposeful activity by the defendants in the District of Columbia by which they invoked the benefits and protections of the District's laws. *See Edmond v. United States Postal Service General Counsel,* 949 F.2d 415, 428 (D.C. Cir. 1991); *First Chicago Int'l v. United Exchange Co., Ltd.,* 836 F.2d 1375, 1378 (D.C. Cir. 1988); *United States v. Philip Morris, Inc.,* 116 F. Supp. 2d at 121. In addition, because a court in the District of Columbia may exercise jurisdiction over a non-resident defendant "only [for] a claim for relief arising from the specific acts enumerated in [the statute] . . . ," D.C. CODE § 13-423(b), plaintiffs' jurisdictional allegations must arise from the same conduct of which they complain. *See Willis v. Willis,* 655 F.2d 1333, 1336 (D.C. Cir. 1981); *Dooley v. United Technologies Corp.,* 786 F. Supp. 65, 71 (D.D.C. 1992); *LaBrier v. A.H. Robins Co., Inc.,* 551 F. Supp. 53, 55 (D.D.C. 1982).

1. "Transacting Business" under Section 13-423(a)(1)

Section 13-423(a)(1) of the long-arm statute provides that "a District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's – transacting any business in the District of Columbia." D.C.

CODE § 13-423(a)(1). To establish personal jurisdiction under this subsection, plaintiffs must demonstrate that (1) the defendant transacted business in the District; (2) the claim arose from the business transacted in the District; (3) the defendant had minimum contacts with the District; and (4) the Court's exercise of personal jurisdiction would not offend "traditional notions of fair play and substantial justice." *Dooley v. United Technologies,* 786 F. Supp. at 71; *see also Novak-Canzeri v. Saud,* 864 F. Supp. 203, 206 (D.D.C. 1994) (because of the "arising from" requirement of Section 13-423(b), "[t]he claim itself must have arisen from business transacted in the District or there is no jurisdiction"). Section 13-423(a)(1) of the long-arm statute permits the exercise of personal jurisdiction to the full extent permitted by the Due Process Clause of the Constitution. *See First Chicago Int'l v. United Exchange Co. Ltd.,* 836 F.2d at 1377; *Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.,* 355 A.2d 808, 810-11 (D.C. 1976) (en banc).

The constitutional touchstone of the due process determination is "whether the defendant purposefully established minimum contacts in the forum state." *Asahi Metal Industry Co. v. Superior Court,* 480 U.S. 102, 108-09 (1987) (internal citations and emphasis omitted). On the other hand, as the Supreme Court recognized in *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 476 (1985) (emphasis in original), in today's commercial world business is often transacted solely by mail and wire communications across state lines and jurisdiction may sometimes exist even if a defendant "did not *physically* enter the forum state." The Court explained that in such cases it is necessary to determine whether the commercial actor that is the subject of the lawsuit "purposefully availed itself of the privilege of conducting business in the forum state," and whether the defendant's conduct in connection with that state is such that it "should reasonably anticipate being haled into court there." *Id.* at 474-75 (internal citation and quotation omitted). When the "transacting business" analysis concerns a contractual relationship, factors that inform the analysis include the nature of the prior negotiations between the parties, the agreement's contemplated future consequences, the terms of the contract, the parties' actual course of dealing and how each party manifested a connection to the forum. *See id.* at 479; *Schwartz v. CDI Japan, Ltd.,* 938 F. Supp. 1, 6 (D.D.C. 1996)

a. The Institutional Defendants

Plaintiffs generally allege that "each of the named Defendants and members of the Defendant Class illegally contract, combine and conspire with persons and entities that have committed, and continue to commit, overt acts within the District of Columbia in furtherance of the contract, combination and conspiracy alleged in this Complaint." Compl. ¶ 9. Plaintiffs then make the same generic claim with respect to each moving institutional defendant, alleging that the "[institutional defendant] is a [non-District of Columbia] not-for-profit corporation with its principal place of business [outside the District of Columbia]. [The institutional defendant] sponsors medical residency programs, employing members of the Plaintiff Class. [The institutional defendant] has contracted, combined and conspired with the named Defendants to restrain competition as alleged in this Complaint. Certain conspiratorial acts in which this Defendant participated took place in Washington, D.C." *Id.* ¶¶ 25-28, 30-32, 34, 40-43, 45-47, 49. The Court concludes that these generalized conclusory allegations alone are facially insufficient to meet plaintiffs' jurisdictional burden. *See GTE New Media Services Inc. v. Ameritech Corp.,* 21 F. Supp. 2d at 36.

In their opposition to defendants' motions to dismiss, plaintiffs attempt to re-sculpt and refine these generalized allegations, asserting that the institutional defendants, "through the intensely interactive NRMP web-site, [enter] into contracts in the District of Columbia to secure employment of a significant and important portion of their work force, provide a steady stream of information to the NRMP in order to effectuate the Match, and obtain Match Results," thereby transacting business in the District of Columbia. Plaintiffs' Corrected Memorandum of Points and Authorities in Support of Its Omnibus Opposition to Defendants' Motions to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(2) ("Pls.' (b)(2) Opp.") at 36. It is undisputed that Barnes Jewish-Hospital, Baylor College of Medicine, Beth Israel Deaconess Medical Center, Inc., Boston Medical Center Corp., Cedars-Sinai Medical Center, The Cleveland Clinic Foundation, Emory University, Rhode Island Hospital, Rush-Presbyterian-St. Luke's Medical Center, St. Louis University, Stanford Hospital & Clinics, Thomas Jefferson University Hospital, Inc., Administrators of the Tulane Educational Fund, University Hospitals of Cleveland, Inc. and Yale-New Haven Hospital, Inc. each annually participates in the Match by contracting to participate in the program, submitting its preference list to the NRMP, which operates from the AAMC's office in the

District of Columbia, and receiving the results of the Match upon its completion.[2]

Six of these institutional defendants admit that they have "sporadic" contacts with the NRMP in connection with the Match in addition to the annual submission of the institution's Match list.[3] The remaining institutional defendants that participate in the Match assert that they interact with the NRMP only once a year when they transmit their preference lists to the organization. These assertions are contradicted, however, by plaintiffs' documentation of certain contacts with the NRMP in connection with the Match during 1999-2001. These additional contacts include the submission of quota change forms, updates of institutional information, information and association data forms and/or "reversion" of unfilled position forms. Plaintiffs concede that no one institution submitted more than ten of these communications to the NRMP in any given year. *See* Pls.' (b)(2) Opp., Ex. 11, Defendant NRMP's Objections and Answers to Plaintiff Paul Jung's First Set of Interrogatories on Jurisdiction; Schedule II.B., "Communications from Institutions/Programs to the NRMP-2001 Residency Match;" Schedule III.B, "Communications from Institutions/Programs to the NRMP-2000 Residency Match;" and Schedule IV.B, "Communications from Institutions/Programs to the NRMP-1999 Residency Match." It is these additional contacts on which plaintiffs base their assertion that in providing a steady stream of information into the District of Columbia in order to effectuate the Match, the moving institutional defendants "transacted business" to an extent sufficient to provide jurisdiction under Section 13-423(a)(1) of the long-arm statute.

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[2] Washington University Medical Center asserts that contrary to plaintiffs' complaint it does not participate in the Match. *See* Supplemental Memorandum of Law in Support of Defendant Washington University Medical Center's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Brian Phillips ¶ 4. Plaintiffs do not refute this statement.

[3] *See* Supplemental Memorandum of Points and Authorities in Support of Defendant Barnes-Jewish Hospital's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Terra Mouser ¶ 2 ("Barnes-Jewish Hospital also has sporadic contact with the NRMP's technical support staff"); Supplemental Memorandum in Support of Defendant Baylor College of Medicine's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Ralph D. Feigin ¶ 4 (interactions include transmission of resident names, telephone calls to NRMP to address electronic submission problems, receipt of periodic emails and packages from NRMP); Supplemental Memorandum of Points and Authorities in Support of Defendant Emory University's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of James R. Zaidan, M.D., M.B.A ¶ 3 (defendant "has sporadic contact with the NRMP's technical support staff"); Memorandum of Law in Support of Defendant Rush Presbyterian St. Luke's Medical Center's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Thomas A. Deutsch ¶ 4 (defendant "has sporadic contact with the NRMP's technical support staff"); Supplemental Memorandum of Points and Authorities in Support of Defendant Stanford Hospital & Clinics' Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Ann M. Dohn ¶ 3 (defendant "has sporadic contact with the NRMP's technical support staff"); Supplemental Memorandum of Points and Authorities in Support of Defendant Tulane's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2); Declaration of Edward F. Foulks, M.D., Ph.D. ¶ 3 (defendant "has sporadic contact with the NRMP's technical support staff").

The Court concludes that the fact that the moving institutional defendants entered into the Institutional Match Contract and communicated information concerning their individual programs to the NRMP up to ten times a year in order to effectuate an accurate Match does not by itself form a basis for personal jurisdiction. *See Far West Capital, Inc. v. Towne,* 46 F.3d 1071, 1076-77 (10th

Cir. 1995) (non-forum defendant's phone calls and ten to twenty faxes to in-forum plaintiff during course of contract negotiation were insufficient to establish minimum contacts under transacting business prong of state long-arm); *see also Wien Air Alaska, Inc. v. Brandt,* 195 F.3d 208, 213 (5th Cir. 1999) (defendant's numerous communications into forum cannot serve as basis of jurisdiction if they do not themselves form basis of complaint).[4] The Court must focus on the quality of the contacts rather than their quantity. *See Mouzavires v. Baxter,* 434 A.2d 988, 995 (D.C. 1981) (en banc) ("notions of fundamental fairness require that the defendant's contacts with the forum be evaluated qualitatively rather than quantitatively" in assessing "transacting business" prong of long-arm statute).

Upon consideration of the contacts alleged in plaintiffs' complaint, the Court concludes that the contacts simply are not of the quality that would support a conclusion that the institutional defendants have "purposefully availed [themselves] of the privilege of conducting business in the forum state," such that they "should reasonably anticipate being haled into court" here under Section 13-423(a)(1). *Burger King Corp. v. Rudzewicz,* 471 U.S. at 474-75.[5] First, no prior negotiation of the Institutional

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[4] Taking plaintiffs' argument to its logical conclusion, a forum-based entity could ensure that the Court had jurisdiction over any non-forum contracting party merely by requesting that the non-forum party provide any information necessary to execute the contract in intervals. *See Health Communications, Inc. v. Mariner Corp.,* 860 F.2d 460, 463 (D.C. Cir. 1988).

[5] Plaintiffs' discussion of personal jurisdiction predicated on a defendant's contact with a forum via an interactive web site is a red herring. Those cases cited by plaintiffs address the question of whether a defendant, by maintaining *its own* interactive web site that is accessible to or directed towards a specific jurisdiction, makes itself

(Continued on following page)

Match Contract between any institution and the NRMP took place at all, let alone in the District of Columbia; the contract is a form contract into which the institutional defendants entered by listing their names and the number of residency positions they had available. *See* Omnibus Reply Memorandum in Support of Motions by Various Defendants to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(2), Ex. O, NRMP Institutional Agreement. Second, it is not contested that the future consequence of the Institutional Match Contract for the moving institutional defendants was the placement of residents with those defendants *outside* the District of Columbia; the execution of the contract did not result in any continuing connections with the District. *Compare Burger King Corp. v. Rudzewicz,* 471 U.S. at 480 (contract executed in forum "envisioned continuing and wide-reaching contacts with [plaintiff] in the forum").

Third, no terms in the Institutional Match Contract itself indicate any special connection with the District of Columbia. The only indication at all that the Match occurred in the District of Columbia is the listing of the NRMP's Washington, D.C. address on the face of the contract. Fourth, the contract includes a choice-of-law provision designating Illinois law. While this by no means

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vulnerable to suit within that forum. *See Gorman v. Ameritrade Holding Corp.,* 293 F.3d 506, 513 (D.C. Cir. 2002); *Blumenthal v. Drudge,* 992 F. Supp. 44, 53 (D.D.C. 1998). Here, plaintiffs cite to the defendants' use of a co-defendant's web site for the purpose of sending information into the District in connection with the execution of the Match. As the Court concludes, however, such communications to the NRMP, whether in electronic or in written form, are insufficient to demonstrate that the institutional defendants purposefully availed themselves of the privileges and the responsibilities of conducting business in the District of Columbia.

conclusively demonstrates that defendants are beyond the Court's jurisdictional reach, it does inform the assessment of whether the defendants could have reasonably foreseen being involved in litigation in the District of Columbia concerning the execution of the Institutional Match Contract. *See Burger King Corp. v. Rudzewicz,* 471 U.S. at 482.

Finally, there is nothing in the parties' actual course of conduct that indicates that the moving institutional defendants should have reasonably foreseen being subject to the jurisdiction of this Court. There is no debate that the Match is very important to the institutional defendants' business of providing health care; it is the mechanism by which the institutional defendants hire resident doctors. The NRMP is not involved, however, in the hospitals' substantive process of evaluating potential residents prior to submission of the preference lists. Nor does the NRMP continue to play a role in the hospitals' business once the Match is completed or in any other fashion exert control over the rest of the hospitals' affairs. The mere fact that the NRMP, with its principal place of business in the District of Columbia, entered into a contract with others cannot "standing alone" provide jurisdiction over those other contracting parties. *See Health Communications, Inc. v. Mariner Corp.,* 860 F.2d at 462 (citing *Burger King Corp. v. Rudzewicz,* 471 U.S. at 482) (no jurisdiction absent demonstrated integration of parties' businesses or continued influence of forum resident over non-resident defendant, notwithstanding fact that contract was partially performed in forum); *Mouzavires v. Baxter,* 434 A.2d at 995 (proper application of minimum contacts formula requires consideration "not only of whether a nonresident defendant has sufficient contacts with the forum, but also of whether those [illegible] acts are voluntary and deliberate, rather than fortuitous").

Plaintiffs rely heavily on *Schwartz v. CDI Japan, Ltd.* in support of their jurisdictional argument. Plaintiffs are correct that the Court in *Schwartz* stated that "[t]he 'transacting any business' provision of the District's long-arm statute embraces the contractual activities of a non-resident defendant that cause repercussions in the District" and that "[i]t is 'therefore sufficient' . . . that the suit [be] based on a contract that [has] [a] substantial connection with the District." *Schwartz v. CDI Japan, Ltd.,* 938 F. Supp. at 5 (quoting *Mouzavires v. Baxter,* 434 A.2d at 992). Plaintiffs fail to recognize, however, that the defendant's contacts with the District of Columbia in *Schwartz* were much more extensive than those of the moving institutional defendants here. In *Schwartz,* the foreign defendant not only had assumed a contract with the Smithsonian Institution's National Museum of American Art ("NMAA"), but also had assumed any additional contracts entered into by the defendant's former agent with the museum, which indicated the defendant's continuing "[intention] to reap the financial benefits from transacting business [with the NMAA] in this forum." *Schwartz v. CDI Japan, Ltd.,* 938 F. Supp. at 7. Furthermore, the assumed contract expressly designated the District of Columbia as the site of the execution of the contract, called for the delivery of products to the Smithsonian in the District of Columbia, and required the defendant to make payments and reimbursements to the NMAA into a District of Columbia bank account. *See id.* at 6. In addition, an agent of the non-resident defendant had negotiated the assumed contract in the District. *See id.* at

8. No similar contacts with the forum of this quality exist in the instant circumstances.

The Court therefore concludes that the moving institutional defendants' entry into the Institutional Match Contract, and the accompanying electronic and/or mail correspondence those defendants sent into the District in support of the contract, do not and cannot provide a basis for personal jurisdiction under Section 13-423(a)(1) of the long-arm statute.

b. The Organizational Defendants

Aside from the conclusory, generalized allegations in the complaint concerning "defendants," which the Court already has found insufficient to meet the pleading standards for personal jurisdiction over the institutional defendants in Section II(B)(1)(a), *supra,* plaintiffs provide scant additional support for their jurisdictional claim that the ABMS or the CMSS transacts business in the District of Columbia for the purposes of the long-arm statute. In their complaint, plaintiffs introduce the ABMS as "an Illinois not-for-profit corporation whose membership consists of 24 recognized medical specialty certification boards in the United States" that "develop and apply professional and education standards for the evaluation and certification of physician specialists." Compl. ¶ 20. Plaintiffs also allege that the ABMS is one of five "governing sponsors" of the NRMP. *Id.* With respect to the CMSS, plaintiffs allege that it is "a not-for-profit corporation whose membership consists of 17 physician societies in specialties having a member board participating in ABMS" and that it also is one of five "governing sponsors" of the NRMP. *Id.* ¶ 21.

Plaintiffs do not define "governing sponsor" in their complaint. In their opposition to defendants' motions to dismiss, plaintiffs cite to statements by the Executive Director of the NRMP, Robert L. Beran, Ph.D., that the ABMS and the CMSS are two of five "sponsors" of the NRMP. Pls.' (b)(2) Opp. at 30 (citing Defendant National Resident Matching Program's Motion to Dismiss and Compel Arbitration, Ex. A, Affidavit of Robert L. Beran, Ph.D. ("Beran Compel Aff.") ¶ 1). Plaintiffs assert that the ABMS thus itself "admits" that it is a sponsor of the NRMP, that its representative serves as President of the NRMP and that its representative telephones the NRMP several times a month. Plaintiffs also assert that the CMSS admits to its "involvement" with the NRMP and has "contacts with the District of Columbia." Pls.' (b)(2) Opp. at 30. Plaintiffs charge that the relationships between these two organizational defendants and the NRMP are "ongoing and committed [, and] as sponsors, [the ABMS and the CMSS] are entitled to and do elect two members to the twelve member NRMP Board of Directors." *Id.* at 36. From this predicate, plaintiffs argue that "the two moving Organizational Defendants play an integral role in governing the NRMP, [and in] formulating its policies, including the anti-competitive policies of the Match," and that they therefore are subject to suit in the District of Columbia under Section 13-423(a)(1). *Id.*

The ABMS and the CMSS offer support for their motions to dismiss in the form of sworn declarations from their Executive Vice President and President, respectively. Each states that his organization does not elect members to the NRMP board, but instead nominates individuals from the organization to serve; the NRMP board itself elects its members. *See* Declaration of Stephen H. Miller, M.D., Ph.D., in Support of Motion of the American Board of Medical Specialties to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(2) ("Miller Decl.") ¶ 6; Declaration of Bruce E. Spivey, M.D., in Support of Motion of the Council of Medical Specialty Societies to Dismiss the Complaint ("Spivey Decl.") ¶ 6. In addition, Dr. Spivey states that the CMSS nominees to the NRMP board are not officers or employees of the CMSS and do not act on the CMSS's behalf. *See* Spivey Decl. ¶ 6. While it may be that nomination is tantamount to election, both Dr. Miller and Dr. Spivey state that their respective organizations do not exercise any control over the activities of the NRMP after their organizations' nominees are elected to the NRMP board. *See* Miller Decl. ¶ 6; Spivey Decl. ¶ 6. In a separate affidavit, the Executive Director of the NRMP confirmed that "the sponsoring organizations only have the right to nominate. Election of new board members is left to the discretion of the current Board. The sponsoring organizations *have no other power* with respect to the NRMP." Beran Compel Aff. ¶ 3 (emphasis added). Furthermore, while Dr. Miller is both Executive Vice President of the ABMS and President of the NRMP, he states that all the business he conducts with NRMP personnel, which includes several telephone conversations a month and travel once or twice a year to the District of Columbia, is in his capacity as NRMP President and not on behalf of the ABMS. *See* Miller Decl. ¶ 7. These statements in declarations and affidavits offered in support of defendants' motions remain uncontradicted by plaintiffs.

The Court concludes that plaintiffs have not alleged sufficient facts to demonstrate that either the ABMS or the CMSS transacts business in the District of Columbia for purposes of the long-arm statute. Plaintiffs' only true jurisdictional claim rests on the fact that these organizational defendants are "governing sponsors" of the NRMP and nominate two directors to the NRMP board. Because plaintiffs do not define "governing sponsor," the Court is left to consider what that term may mean. In light of plaintiffs' assertion that as governing sponsors the organizational defendants have the power to direct policy and determine procedures of the NRMP, perhaps the most analogous relationship is that of a parent corporation with control over the activities of its subsidiary. *See, e.g., El-Fadl v. Central Bank of Jordan,* 75 F.3d 668, 676 (D.C. Cir. 1996) ("[I]f parent and subsidiary 'are not really separate entities,' . . . or one acts as an agent of the other, . . . the local subsidiary's contacts can be imputed to the foreign parent."). If this is the most analogous relationship, however, it does not serve plaintiffs well. Plaintiffs fail to allege a sufficient level of control by the ABMS and/or the CMSS over the NRMP, and the uncontradicted declarations submitted by Dr. Miller and Dr. Spivey state unequivocally that their organizations do not exercise any control over the activities of the NRMP. The Court therefore has no basis to attribute the activity of the NRMP in the District of Columbia to either organization.[6]

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[6] With further respect to the fact that Dr. Miller serves both as President of the NRMP and Executive Vice President of the ABMS, plaintiffs have not disputed Dr. Miller's declaration that any actions he took in the District of Columbia were in his capacity as President of the NRMP and not in his capacity as Executive Vice President of the ABMS. The presence of Dr. Miller as an officer of both organizations, without additional allegations that the steps Dr. Miller took nominally as NRMP President were in fact taken on behalf of the ABMS, is insufficient to demonstrate jurisdiction over the ABMS. *See United States v. Bestfoods,* 524 U.S. 51, 69-70 (1998); *Doe v. Unocal Corp.,* 248 F.3d 915, 925-26 (9th Cir. 2001) (applying *United States v. Bestfoods* in

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2. Sections 13-423(a)(3) and (4): Tortious Injury

Section 13-423(a)(3) of the long-arm statute confers jurisdiction over a person who causes "tortious injury in the District of Columbia by an act or omission in the District of Columbia." D.C. CODE § 13-423(a)(3). To invoke this subsection, plaintiffs must show that the moving defendants either directly or through an agent caused tortious injury to plaintiffs in the District of Columbia by an act or omission in the District of Columbia. *See Richard v. Bell Atlantic Corp.,* 946 F. Supp. 54, 73 (D.D.C. 1996); *see generally Moncrief v. Lexington Herald-Leader Co.,* 807 A.2d 217, 219 (D.C. 1986).

Section 13-423(a)(4) of the long-arm statute provides:

> A District of Columbia court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a claim for relief arising from the person's . . . causing tortious injury in the District of Columbia by an act or omission outside the District of Columbia if he regularly does or solicits business, engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the District of Columbia.

D.C. CODE § 13-423(a)(4). In order to establish personal jurisdiction under this subsection after jurisdictional discovery has taken place plaintiffs must demonstrate by a preponderance of the evidence that (1) plaintiffs suffered a tortious injury in the District of Columbia; (2) the injury was caused by a defendant's act or omission outside of the

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specific jurisdiction context); *In re Vitamins Antitrust Litigation,* 270 F. Supp. 2d at 26.

District; and (3) the defendant had one of the three enumerated contacts with the District of Columbia. *See Crane v. Carr,* 814 F.2d 758, 762-63 (D.C. Cir. 1987); *Blumenthal v. Drudge,* 992 F. Supp. at 53; *Trager v. Berrie,* 593 F. Supp. 223, 225 (D.D.C. 1984).[7]

Under both "tortious injury" subsections of the long-arm statute plaintiffs must allege that they have suffered a tortious injury in the District of Columbia. In their complaint, plaintiffs allege no injury to the named plaintiffs within the District of Columbia. In their opposition to defendants' motion to dismiss, plaintiffs attempt to describe an injury, citing to allegations in the complaint that the defendants' actions restrained competition in the recruitment, hiring, employment and compensation of resident physicians nationwide. Because the District of Columbia is part of the alleged national relevant market in which competition was restrained, plaintiffs argue that they lost "the right to negotiate with employers in the District of Columbia for placement as resident physicians" as a result of the alleged anticompetitive activity. Pls.' (b)(2) Opp. at 37-38. Plaintiffs have failed, however, to allege or otherwise demonstrate any facts that any named plaintiff pursued or would have pursued a resident position within the District of Columbia by ranking or interviewing with a District of Columbia hospital, or undertook any other action in connection with residency employment in the District. Absent such allegations, plaintiffs' argument fails. There has been no tortious injury to any plaintiff in the District of Columbia. If the Court were to find jurisdiction under this flawed premise, any plaintiff alleging an antitrust conspiracy could satisfy the tortious injury requirement under either "tort" prong of the long-arm statute simply by asserting that the District of Columbia is part of the relevant market.[8]

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[7] Then Circuit Judge Ruth Bader Ginsburg described these three contacts as the "plus factors," factors that demonstrate some "reasonable connection" between the jurisdiction in which the court sits "separate from and in addition to" the injury caused in the jurisdiction. *Crane v. Carr,* at 762. The "plus factor" or factors "need not be related to the act that caused the injury; all that is required is 'some other reasonable connection' between the defendant and the forum." *Id.* at 762-63. The "plus factor" does not itself provide the basis for jurisdiction – the injury does – but "it does serve to filter out cases in which the in-forum impact is an isolated event and the defendant otherwise has no, or scant, affiliation with the forum." *Id.* at 763. *See also Blumenthal v. Drudge,* 992 F. Supp. at 54 (under Section 13-423(a)(4), the injury – not the enumerated contacts – "provides the basis for jurisdiction").

At oral argument, plaintiffs argued belatedly that the injury was the Match itself – that is, that the injury is the actual binding of the fourth year medical student to a specific residency program – and thus the tortious injury occurred in the District of Columbia where the Match is executed. *See* Transcript of February 23, 2003 Motions Hearing, Afternoon Session ("Tr.") at 41 ("As soon as that rank order list is submitted, and the algorithm employed, and that match is made, that is the injury."). Without reaching the merits of this "injury" claim, the Court rejects this line of reasoning in light of the plaintiffs' own assertion in their complaint and briefs that plaintiffs are bound and thus, by extension, injured upon entry into the Student Match Contract rather than upon the execution of the contract. *See* Compl. ¶ 86(b); Pls.' (b)(2) Opp. at 6 n.4 ("[M]edical school seniors who sign up for the Match agree that they will accept the position to which they are matched if a match is made, and will enroll in the residency program to which they are matched by the NRMP. 'The listing of [. . .] a program by an applicant on the individual's Rank Order List establishes a commitment to [. . .] accept an appointment when a match results.'") (quoting *NRMP Handbook for Institutions and Program Directors* at 4-5). There are no allegations that plaintiffs were in the District of Columbia when they entered into the Student Match Contract. The Court concludes that plaintiffs' allegations are insufficient to demonstrate any tortious injury in the District of Columbia, and therefore that jurisdiction cannot be predicated on Section 13-423(a)(3) or (4) of the long-arm statute.

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[8] While some putative class members likely pursued employment in the District, defendants are correct that plaintiffs cannot rely on alleged injury to putative plaintiffs in order to meet the in-District injury requirement. *See Selman v. Harvard Medical School,* 494 F. Supp. 603, 621 (S.D.N.Y. 1980), *aff'd without opinion,* 636 F.2d 1204 (2d Cir. 1980) (plaintiff's contention that "injuries and facts relevant to other members of the class should be used in determining jurisdiction" was rejected because "the named representative himself must satisfy all jurisdictional prerequisites before the action can go forward"); *accord Williams v. FirstPlus Home Owner Loan Trust 1996-2,* 209 F.R.D. 404, 413 (W.D. Tenn. 2002); *Barry v. Mortgage Servicing Acquisition Corp.,* 909 F. Supp. 65, 74-75 (D. R.I. 1995).

C. *Personal Jurisdiction under Section 12 of the Clayton Act: "Transacting Business"*

Plaintiffs assert that the Court has jurisdiction over all the moving defendants under the jurisdictional grant of Section 12 of the Clayton Act. *See* Compl. ¶ 7. Section 12 states that "[a]ny suit, action, or proceeding under the antitrust laws against a corporation may be brought not only in the judicial district whereof it is an inhabitant, but also in any district wherein it may be found or transacts business; and all process in such cases may be served in the district of which it is an inhabitant, or wherever it may be found." 15 U.S.C. § 22.

In determining whether jurisdiction over defendants exists under the Clayton Act, the Court must assess "whether the corporation is doing business in the district of any substantial character, even if its business is entirely interstate in character and is transacted by agents who do not reside in the District." *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority,* 475 F. Supp. 711, 716 (D.D.C. 1979). *See also Mylan Laboratories, Inc. v. Akzo, N.V.,* Civil Action No. 89-1671, 1990 U.S. Dist. LEXIS 3521, at *21 (D.D.C. Mar. 27, 1990); *Chrysler Corp. v. General Motors Corp.,* 589 F. Supp. 1182, 1195 (D.D.C. 1984). The Court must look for "tangible manifestations of doing business" in the District of Columbia, such as the presence of officers, employees, agents, offices, ownership of property, maintenance of corporate records or bank accounts. *Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority,* 475 F. Supp. at 716. Unlike the "transacting business" analysis conducted under the District of Columbia long-arm statute, jurisdiction under Section 12 does not require that the transactions on which jurisdiction is based be related to the cause of action underlying the suit. *See Diamond Chemical Co., Inc. v. Atofina Chemicals, Inc.,* 268 F. Supp. 2d 1, 10 (D.D.C. 2003) (quoting *Chrysler Corp. v. General Motors Corp.,* 589 F. Supp. at 1195).

1. The Institutional Defendants

Plaintiffs do not allege any tangible manifestations of doing business in the District of Columbia on the part of the moving institutional defendants. Instead, they invite the Court to consider the institutional defendants' participation in the Institutional Match Contract, the COTH Survey and activities related to the institutions' membership in the AAMC. *See* Pls.' (b)(2) Opp. at 44 ("[E]ach of the moving Institutional Defendants enter into multiple agreements with the D.C.-based NRMP and AAMC to perform highly prized services which require regular and ongoing contacts with each of the D.C.-based entities, and the Institutional Defendants pay fees into the District of Columbia for those services.").

It is undisputed that Barnes-Jewish Hospital, Beth Israel Deaconess Medical Center, Inc., Boston Medical Center Corp., Cedars-Sinai Medical Center, The Cleveland Clinic Foundation, Emory University, Rhode Island Hospital, Rush-Presbyterian-St. Luke's Medical Center, St. Louis University, Stanford Hospital & Clinics, Thomas Jefferson University Hospital, Inc., Administrators of the Tulane Educational Fund, University Hospitals of Cleveland, Inc. and Yale-New Haven Hospital, Inc. participated in the Match and in the annual COTH Survey by submitting the institutions' resident stipend data to the AAMC, and by receiving the results of the Survey in return.[9]

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[9] There are three institutions that challenge plaintiffs' allegation that they participate in the COTH Survey. *See* Supplemental Memorandum of Law in Support of Defendant Washington University Medical Center's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Brian Phillips ¶ 4; Supplemental Memorandum in Support of Defendant Baylor College of Medicine's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Ralph D. Feigin ¶ 5; Supplemental Memorandum of Points and Authorities in Support of Defendant Tulane's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Supplemental Declaration of Edward F. Foulks, M.D., Ph.D. ¶ 2. Beth Israel Deaconess states that it has not participated in the COTH Survey since

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In addition to participating in the Match and the COTH Survey, a majority of the moving institutional defendants admit that they or their employees had additional contacts with the District of Columbia. First, The Cleveland Clinic Foundation states that it employs one lobbyist who travels to the District of Columbia "solely for the purpose of lobbying the federal agencies and government," but asserts that such actions are protected by the government contacts exception. Defendant The Cleveland Clinic Foundation's Supplemental Memorandum of Points and Authorities in Support of Its Motion and the Omnibus Memorandum in Support of Motions by Various Defendants to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2) at 6 n.3. Second, Beth-Israel Deaconess Medical Center, Inc., Boston Medical Center Corp., Cedars-Sinai Medical Center, Rhode Island Hospital, Thomas Jefferson University Hospital, Inc., University Hospitals of Cleveland, Inc. and Yale-New Haven Hospital, Inc. acknowledge that they employ individuals who are members of organizations such as defendant American Hospital Association ("AHA"), the AAMC and/or the COTH Section and that these employees travel to the District of Columbia to fulfill their obligations to such organizations.[10]

1999. *See* Supplemental Memorandum in Support of Defendant Beth Israel Deaconess Medical Center's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Paul F. Levy ¶ 4.

[10] *See* Supplemental Memorandum in Support of Defendant Beth Israel Deaconess Medical Center's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Paul F. Levy ¶ 4; Supplemental Memorandum in Support of Defendant Boston Medical Center's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of John B. Chessare, M.D. ¶ 4; Defendant Cedars-Sinai's Supplemental Memorandum of Points and Authorities in Support of Motion to Dismiss the Complaints Pursuant to Fed. R. Civ.

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Third, Baylor College of Medicine acknowledges that it has had two additional contacts with the District: specifically that it contracted with a firm that provides services concerning relations with the federal government, and that certain Baylor residents each year attend a program conducted in the District of Columbia by the United States Department of Defense. *See* Supplemental Memorandum in Support of Defendant Baylor College of Medicine's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2) at 3 n.2. Finally, the Administrators of the Tulane Educational Fund admits that it has one assistant professor who "is providing technical advice concerning infectious disease programs in Africa pursuant to a subcontract for the United States Agency for International Development (USAID). This employee works out of a private nonprofit organization that is the prime contractor to USAID." Supplemental Memorandum of Points and

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P. 12(b)(2), Declaration of Thomas M. Priselac ¶ 6 (President and Chief Executive Officer in individual capacity is member of AHA and Chair of COTH Administrative Board; travels to the District four to six times a year to fulfill related obligations); Supplemental Memorandum of Law in Support of Defendant Rhode Island Hospital's Motion to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Joseph F. Amaral ¶ 4; Defendant Thomas Jefferson University Hospital's Motion to Dismiss the Complaint, Declaration of Thomas J. Lewis ¶ 4 (President and Chief Executive Officer travels on behalf of defendant to District four times a year to fulfill obligations related to membership in AHA and COTH); Supplemental Memorandum in Support of Defendant University Hospitals of Cleveland, Inc.'s Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of John Ferry, M.D. ¶ 7 (employees travel to District of Columbia in individual capacities as members of professional or industry organizations); Supplemental Memorandum of Law in Support of Defendant Yale-New Haven Hospital's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2), Declaration of Joseph A. Zaccagnino ¶ 4 (employees travel to District of Columbia in individual capacities as members of professional or industry organizations).

Authorities in Support of Defendant Tulane's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2); Declaration of Anthony P. Lorino ¶ 4.

To the extent that the moving institutional defendants admit to their agents' presence in the District of Columbia in order to lobby certain agencies of the federal government on the defendants' behalf, such contacts with the District are excluded from the jurisdictional analysis under the "government contacts" exception. Under this exception, a person or company does not subject itself to the jurisdiction of the courts of the District of Columbia merely by filing an application with a government agency or by seeking redress of grievances from the Executive Branch or the Congress. *See Naartex Consulting Corp. v. Watt,* 722 F.2d 779, 787 (D.C. Cir. 1983); *Environmental Research Int'l, Inc. v. Lockwood Greene Eng'rs, Inc.,* 355 A.2d at 813. "The District of Columbia's unique character as the home of the federal government requires this exception in order to maintain unobstructed access to the instrumentalities of the federal government." *Cellutech, Inc. v. Centennial Cellular Corp.,* 871 F. Supp. 46, 50 (D.D.C. 1994). *See also Mallinckrodt Medical, Inc. v. Sonus Pharmaceuticals, Inc.* 989 F. Supp. 265, 271 (D.D.C. 1998).

The Court also concludes that the institutional defendants' membership in and contacts with the AAMC or the COTH Section in the District of Columbia should not be considered in the evaluation of whether any defendant transacted business of any "substantial character" in the District because it is established that the "government contacts" exception extends "to non-resident contact with trade associations located with [sic] the District of Columbia." *World Wide Minerals, Ltd. v. Republic of Kazakhstan,* 116 F. Supp. 2d 98, 105-06 (D.D.C. 2000). The

AAMC is a typical association for these purposes; it is "a non-profit association founded [] to work for reform in medical education" and "[a]s an association of medical schools, teaching hospitals, and academic societies, the AAMC works with its members to set a national agenda for medical education, biomedical research, and health care, and assists its members by providing services at the national level that facilitate the accomplishment of their missions." *See* Omnibus Reply Memorandum in Support of Motions by Various Defendants to Dismiss the Complaint Pursuant to Fed. R. Civ. P. 12(b)(2), Ex. F, "About the AAMC." Any travel to the District by an institutional defendant's agent for the purpose of fulfilling the membership obligations of the institution in the AAMC or the COTH Section therefore does not subject the defendant to the jurisdiction of the Court. *See World Wide Minerals, Ltd. v. Republic of Kazakhstahn,* 116 F. Supp. 2d at 105-06; *American Association of Cruise Passengers v. Cunard Line, Ltd.,* 691 F. Supp. 379, 380 (D.D.C. 1987) ("attendance at a trade association meeting [. . .] does not constitute 'transacting business'" under the long-arm statute).

The Court thus is left to consider only plaintiffs' allegations with respect to the institutional defendants' participation in the Match Program and the COTH Survey, and the *de minimis* contacts admitted by Baylor College of Medicine and the Administrators of the Tulane Educational Fund with respect to those institutions. The Court concludes that these contacts are not sufficient to provide personal jurisdiction over the moving institutional defendants under Section 12 of the Clayton Act. While plaintiffs attempt to construe the COTH Survey as a service contracted for by the institutional defendants with the AAMC in the District of Columbia, plaintiffs allege in their complaint that the Survey is administered and published by the AAMC and not at the behest of any individual hospital. *Compare* Pls.' (b)(2) Opp. at 18-19 *with* Compl. ¶ 74. Although institutional defendants provide their individual information to the AAMC and the results of the Survey are distributed by the AAMC to its members, the institutional defendants are not required to provide information in order to receive the Survey. In fact, the Survey is available to the public at large. *See* http:/www.aamc.org/hlthcare/coth-hss.start.htm. Upon consideration of plaintiffs' allegations with respect to the COTH Survey, alone or in conjunction with the allegations regarding the Institutional Match Contract and/or the *de minimis* allegations in the complaint described above, the Court concludes that any amalgamation of these contacts with the District of Columbia fails to demonstrate that any of the moving institutional defendants is doing business in the District "of any substantial character," thereby justifying jurisdiction under the Clayton Act. *See Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority,* 475 F. Supp. at 716.[11]

2. The Organizational Defendants

Plaintiffs do not allege any additional contacts with the District of Columbia that would subject the moving organizational defendants to the Court's jurisdiction in addition to those evaluated in the Court's "transacting business" analysis under Section 13-423(a)(1) of the long-arm statute. For the reasons stated in Section II(B)(1)(b), *supra,* the Court therefore concludes that plaintiffs have failed to demonstrate that the ABMS or the CMSS has transacted "substantial business" within the District of Columbia.

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[11] For the reasons stated in Section II(B)(1)(a), *supra*, the moving institutional defendants' contacts with the District of Columbia in connection with the Institutional Match Contract are insufficient by themselves to demonstrate that the defendants conducted "substantial business" within the District.

D. *"Conspiracy Jurisdiction" Under the Long-Arm Statute*

Plaintiffs assert that the Court has jurisdiction over all the moving defendants pursuant to the "conspiracy" theory of long-arm jurisdiction. Under this doctrine, acts undertaken within the forum by one co-conspirator in furtherance of an alleged conspiracy may subject a non-resident co-conspirator to personal jurisdiction under the long-arm statute. *See Second Amendment Foundation v. United States Conference of Mayors,* 274 F.3d 521, 524 (D.C. Cir. 2001) (citing *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d 1020, 1030-31 (D.C. Cir. 1997)) (applying conspiracy theory of personal jurisdiction to long-arm statute's "transacting business" subsection); *First Chicago Int'l v. United Exch. Co.,* 836 F.2d at 1377-78; *Edmond v. United States Postal Serv. Gen. Counsel,* 949 F.2d at 424-425 (discussing application of conspiracy theory under Section 13-423(a)(3)).

Plaintiffs claim that personal jurisdiction exists over each moving defendant pursuant to the conspiracy theory of jurisdiction stemming from Section 13-423(a)(1). *See*

Pls.' (b)(2) Opp. at 24-30.[12] Conspiracy jurisdiction under this subsection presumes that "[p]ersons who enter the forum and engage in conspiratorial acts are deemed to 'transact business' there 'directly'; [and] coconspirators who never enter the forum are deemed to 'transact business' there 'by an agent.'" *Second Amendment Foundation v. United States Conference of Mayors,* 274 F.3d at 523 (quoting D.C. CODE § 13-423(a)(1)). So long as any one co-conspirator commits at least one overt act in furtherance of the conspiracy in the forum jurisdiction, there is personal jurisdiction over all members of the conspiracy. *See Dooley v. United Technologies Corp.,* 786 F. Supp. at 78. In this context, plaintiffs must allege (1) the existence of a conspiracy; (2) the nonresident's participation in or agreement to join the conspiracy; and (3) an overt act taken in furtherance of the conspiracy within the forum's boundaries. *See Edmond v. United States Postal Serv. Gen. Counsel,* 949 F.2d at 425.

"Mere speculation" that a conspiracy exists or that "the non-resident defendants are co-conspirators [is] insufficient to meet plaintiff's [ ] burden." *Dooley v. United Technologies Corp.,* 786 F. Supp. at 78. A plaintiff resting on the conspiracy theory of jurisdiction "must plead with particularity the conspiracy as well as the overt acts within the forum taken in furtherance of the conspiracy." *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan,* 115 F.3d at 1031 (internal quotation omitted). *See also United States v. Philip Morris Inc.,* 116 F. Supp. 2d at 122. This requirement is strictly enforced, and courts in this Circuit have applied the conspiracy jurisdiction theory "warily" in light of concerns that plaintiffs will use the doctrine to circumvent the constitutional boundaries of the long-arm statute. *Dooley v. United Technologies Corp.*, 786 F. Supp. at 77. As Judge Silberman said in his concurring opinion in *Edmond*, "we cannot allow plaintiffs to subvert the important constitutional principles of sovereignty and due process that underlie personal jurisdiction limitations with mere unspecified and unsubstantiated claims that multifarious defendants were part of a broad conspiracy and that one of them committed some [act] in the plaintiffs' desired forum." *Edmond v. United States Postal Serv. Gen. Counsel*, 949 F.2d at 428 (Silberman, J, concurring) (internal quotation omitted). *See also United States v. Philip Morris Inc.*, 116 F. Supp. 2d at 122; *In re Vitamins Antitrust Litigation*, 2001 U.S. Dist. LEXIS 25073, at *46.[13]

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[12] Plaintiffs also claim conspiracy jurisdiction pursuant to Sections 13-423(a)(3) and (4), but their failure to allege an in-forum injury defeats any conspiracy jurisdiction claim based on these subsections. *See* Section II(B)(2), *supra.*

In addition, once jurisdictional discovery has taken place it still is necessary under a theory of conspiracy jurisdiction that plaintiffs demonstrate jurisdiction by a preponderance of the evidence. *See Second Amendment Foundation v. United States Conference of Mayors*, 274 F.3d at 524; *First Chicago Int'l v. United Exch. Co.*, 836 F.2d at 1377-78 ("bare allegation of conspiracy or agency is insufficient to establish personal jurisdiction"); *In re Vitamins Antitrust Litigation,* 2001 U.S. Dist. LEXIS 25073, at *46 (in conspiracy jurisdiction context, issue remains "whether [plaintiffs] have satisfied their preponderance of the evidence burden necessary to defeat the pending motion to dismiss for lack of personal jurisdiction"). Since jurisdictional discovery is limited, however, plaintiffs must prove by a preponderance of the evidence only that acts in furtherance of the alleged conspiracy took place in the District of Columbia. Plaintiffs do not have to demonstrate the very existence of the conspiracy by a preponderance of the evidence. *See Second Amendment Foundation v. United States Conference of Mayors,* 274 F.3d at 524 ("The general rule . . . that a plaintiff must make a *prima facie* showing of the pertinent jurisdictional facts applies to conspiracy-based jurisdiction.") (internal quotation omitted). To impose this additional requirement would place on plaintiffs the inequitable burden of demonstrating the existence of something by a preponderance of the evidence about which they have not yet had the opportunity to conduct discovery.

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[13] To the extent that plaintiffs assert that personal jurisdiction exists over the individual moving defendants under a conspiracy jurisdiction theory under Section 12 of the Clayton Act, this Court explicitly rejected the "conspiracy" theory in the Clayton Act context in *Mylan Laboratories, Inc. v. Akzo, N.V.*, 1990 U.S. Dist. LEXIS 3521, at *6 (jurisdiction "must be properly established as to each defendant, and cannot be based upon allegations that the defendant's co-conspirators were found there, or transacted business there, or that all the conspirators are agents for each other"). *See also Caribe Trailer Systems, Inc. v. Puerto Rico Maritime Shipping Authority*, 475 F. Supp. at 717.

The Court concludes that if the activities alleged constitute a conspiracy to restrain trade, plaintiffs have demonstrated by a preponderance of the evidence that acts in furtherance of the conspiracy took place in the District of Columbia. Specifically, it is uncontested that defendant NRMP conducts the Match in the District of Columbia and that defendant AAMC facilitates the COTH Survey from the District. Plaintiffs also have submitted documentation demonstrating that the District-based institutional defendants MedStar-Georgetown Hospital Medical Center, George Washington University and MedStar Health, Inc. contracted in the District of Columbia with the NRMP to participate in the Match and employed resident physicians in the District of Columbia through the Match Program during the relevant period. *See* Pls.' (b)(2) Opp., Ex. 2, NRMP Directory 1999 Match, Hospitals and Programs Participating in the Matching Program at 12-13. Thus, if there was a conspiracy plaintiffs have demonstrated that several of the conspirators committed overt acts in furtherance of the conspiracy in the District of Columbia. *See In re Vitamins Antitrust Litigation,* 2001 U.S. Dist. LEXIS 25073, at *46. The question remains whether plaintiffs adequately have alleged that a conspiracy existed.

As the Court explains in Section IV(B), *infra,* plaintiffs adequately have alleged a conspiracy to depress resident compensation between, *inter alia,* those institutional defendants that participated in the Match and the NRMP. The Court therefore concludes that the fifteen moving institutional defendants who themselves acknowledge that they took part in the Match Program are subject to the jurisdiction of this Court under the conspiracy theory of jurisdiction. Those institutional defendants are Barnes Jewish-Hospital, Baylor College of Medicine, Beth Israel Deaconess Medical Center, Inc., Boston Medical Center Corp., Cedars-Sinai Medical Center, The Cleveland Clinic Foundation, Emory University, Rhode Island Hospital, Rush-Presbyterian-St. Luke's Medical Center, St. Louis University, Stanford Hospital & Clinics, Thomas Jefferson University Hospital, Inc., Administrators of the Tulane Educational Fund, University Hospitals of Cleveland, Inc. and Yale-New Haven Hospital, Inc.[14] Because

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[14] Thirteen institutional defendants did not move to dismiss this action for lack of personal jurisdiction: MedStar-Georgetown Hospital Medical Center, Inc., George Washington University, MedStar Health,

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plaintiffs failed to demonstrate that defendant Washington University Medical Center participated in the Match or otherwise participated in the conspiracy, plaintiffs have not demonstrated that the Court has personal jurisdiction over Washington University Medical Center. The Court therefore will deny the motions to dismiss for lack of personal jurisdiction filed by fifteen of the sixteen moving institutional defendants – the exception being the motion of Washington University Medical Center, which the Court will grant.

With respect to the ABMS and the CMSS, the organizational defendants that moved to dismiss for lack of personal jurisdiction, the Court concludes that because plaintiffs have failed to demonstrate that either organization participated in the conspiracy, *see* Section IV(B)(2), *infra,* the Court lacks personal jurisdiction over these organizational defendants under a conspiracy theory of jurisdiction and will grant their motions to dismiss for lack of personal jurisdiction.

III. DEFENDANT NRMP'S RULE 12(b)(1) MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND MOTION TO COMPEL ARBITRATION

A. *Background*

The NRMP moves to dismiss plaintiffs' claim against it for lack of subject matter jurisdiction under Rule

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Inc., Beth Israel Medical Center, Duke University Health System, Inc., Henry Ford Health System, The Massachusetts General Hospital, The McGraw Medical Center of Northwestern University, The Mount Sinai School of Medicine of the City University of New York, The New York and Presbyterian Hospital, Strong Memorial Hospital of the University of Rochester, William Beaumont Hospital and Yeshiva University.

12(b)(1) of the Federal Rules of Civil Procedure, arguing that to the extent that plaintiffs' claim relates to the NRMP and its governing sponsors, the claim is subject to compulsory arbitration. The NRMP therefore seeks an order "compelling plaintiffs to arbitrate the first element of their tripartite claim; namely, that defendants used the Matching Program to eliminate competition in the recruitment and employment of resident physicians." Memorandum of Law in Support of Defendant National Resident Matching Program's Motion to Dismiss and to Compel Arbitration ("NRMP Arbit. Mem.") at 7 (internal quotation omitted). The NRMP relies on the arbitration provision of Student Match Contract. The provision states as follows:

> All claims, disputes and other matters in question *arising out of or relating to* this Agreement or the breach thereof, shall be decided by binding arbitration in accordance with the Rules of the American Arbitration Association then in effect, unless the parties mutually agree otherwise. This agreement to arbitrate shall be specifically enforceable. The NRMP Polices shall govern the demand for arbitration and other procedural matters. The arbitrators shall conduct all arbitration proceedings in the Offices of the American Arbitration Association in Chicago, Illinois. This Agreement shall be governed by the laws of the State of Illinois, but Illinois conflicts of laws provisions shall not be construed to apply the law of any other jurisdiction. The unenforceability of one or more of the terms of this Agreement shall not affect the validity of the remaining terms.

Id., citing Beran Compel Aff., Ex. A-1, 1998 Student Agreement of Plaintiff Denise Greene (emphasis added).[15]

The NRMP also relies on another provision in the Student Match Contract that states that "[t]he NRMP Policies and Handbook are incorporated by reference in and are an integral part of this agreement." Beran Compel Aff., Ex. A-1, 1998 Student Agreement of Plaintiff Denise Greene. Among the policies of the NRMP Policies and Handbook is Paragraph 11.0, entitled "Disputes and Claims," which provides that "[a]ny controversy or claim arising out of or related to the Matching Program, any NRMP Agreement or the breach thereof, and in general all disputes between the NRMP and any applicant or institution participating or seeking participation in the Matching Program shall be settled by arbitration in accordance with the Rules of the American Arbitration Association then in effect. . . . " Beran Compel Aff., Ex. A-5, Policies of the NRMP, in effect March 1998 ¶ 11.0.

The NRMP further argues that the claim against the AMA also should be referred to binding arbitration despite the fact that this organization is not a signatory to the Student Match Contract, because plaintiffs' claim against it is based on the organizations' alleged status as governing sponsors of the NRMP. *See* NRMP Arbit. Mem. at 14-16.[16] Plaintiffs and certain institutional defendants oppose the motion.

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[15] Dr. Beran avers that the remaining named plaintiffs also entered into Student Match Contracts with identical arbitration and choice of law provisions, and this assertion is not disputed. *See* Beran Compel Aff. ¶ 10.

[16] The AMA conditionally moves to compel arbitration and adopts the arguments put forth by the NRMP. *See* Motion of Defendant

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B. *Compulsory Arbitration Under the Federal Arbitration Act*

The Federal Arbitration Act ("FAA") provides that a "written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon any grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA applies to any transaction involving interstate commerce and creates a strong presumption in favor of the enforcement of agreements to arbitrate; any doubts regarding the scope of an agreement to arbitrate are to be resolved in favor of arbitration. *See Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 226-27 (1987) (with enactment of the FAA Congress mandated that arbitration agreements be rigorously enforced); *see also Moses H. Cone Memorial Hospital v. Mercury Construction Corporation,* 460 U.S. 1, 24-25 (1983); *Finegold, Alexander & Assocs. v. Setty & Assocs.,* 81 F.3d 206, 207-08 (D.C. Cir. 1996). The Supreme Court has stressed that "the liberal federal policy favoring arbitration agreements, manifested by this provision and the Act as a whole, is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors*

American Medical Association to Dismiss the Complaints Against It for Failure to State a Claim and Conditional Motion to Compel Arbitration at 4-5. Both the ABMS and the CMSS also conditionally move to compel arbitration. *See* Motion of American Board of Medical Specialties to Dismiss the Complaint ("ABMS Mot.") at 1; Motion of Council of Medical Specialty Societies to Dismiss the Complaint ("CMSS Mot.") at 1. Because the Court has concluded that it lacks personal jurisdiction over these organizational defendants, *see* Sections II(B)(1)(b), (2), *supra,* however, the Court will decline to consider the motions to compel of the ABMS or the CMSS.

Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625 (1985). Under the FAA, "[t]here is a presumption of arbitrability in the sense that 'an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 650 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 582-83 (1960) (Brennan, J., concurring)).

This strong public policy in favor of arbitration must be considered in the context of the equally important principle that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. at 648 (internal quotation and citation omitted). *See also EEOC v. Waffle House, Inc.,* 534 U.S. 279, 294 (2002) (FAA "does not require parties to arbitrate when they have not agreed to do so") (internal quotation and citation omitted); *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 57 (1995) ("[T]he FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties."). As the court of appeals has noted, "this principle recognizes that 'arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration.'" *National Railroad Passenger Corp. v. Boston & Maine Corp.,* 850 F.2d 756, 759 (D.C. Cir. 1988) (quoting *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. at 648).

In *Mitsubishi,* the Supreme Court provided the standard by which motions to compel arbitration should be evaluated. The Court's first task "is to determine whether the parties agreed to arbitrate [the] dispute," keeping in the forefront the strong policy favoring arbitration. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. at 626. If the Court finds that the parties did agree to arbitrate the dispute at issue, the Court then must determine "whether legal constraints external to the parties' agreement foreclose[ ] the arbitration of those claims." *Id.* at 628. In other words, is there a competing statute or policy that outweighs the strong interest in referral to arbitration?

Relying on the plain language of arbitration provision of the Student Match Contract signed by each plaintiff – all claims "arising out of or relating to this Agreement" shall be referred to binding arbitration – the NRMP argues that plaintiffs' Section 1 conspiracy claim "arises out of" or "relates to" the Student Match Contract and therefore must be referred to arbitration. The NRMP maintains that the Match itself is "squarely challenged by plaintiffs in this action," that plaintiffs' complaint specifically alleges that "defendants eliminated competition 'by assigning prospective resident physician employees to resident positions through [the Match Program],'" and that the Match Program "is a mechanism that eliminates a free and competitive market and substitutes a centralized anticompetitive allocation system." NRMP Arbit. Mem. at 10-11 (quoting Compl. ¶¶ 3(b), 15, 83-85). The NRMP also focuses on the complaint's allegations that the Match Program "'imposes anticompetitive restraints through several of its features,'" including, *inter alia,* "'forcing applicants to commit contractually to any assigned position as a condition of enrolling in the matching program' and 'severely restricting attempts by employers and applicants to withdraw from the matching program.'" NRMP Arbit. Mem. at 11 (quoting Compl. ¶ 86(a)-(b)). The NRMP asserts that the former of these features "derives from paragraph 7.0 of the NRMP Policies to which applicants pledge adherence in the [Student Match Contract], while the latter derives from Paragraph 9.0 thereof." *Id.* at 11. In light of plaintiffs' specific allegations, the NRMP argues, the conspiracy claim with respect to the NRMP clearly "relates to" or "arises out of" the Match Contract, and therefore should be referred to arbitration under the arbitration agreement.

Plaintiffs respond that the arbitration agreement does not include antitrust claims expressly, that their Sherman Act claim does not concern the Student Match Contract, and that although this contract "may have evidentiary significance in proving defendants' illegal conspiracy," such significance does not mean that the dispute itself "relates to" or "arises from" the contract. Plaintiffs' Consolidated Brief Opposing Defendants' Motion to Dismiss and to Compel Arbitration ("Pls.' Arbit. Opp.") at 8.

Generally, courts have interpreted broadly agreements providing for the arbitration of disputes "arising out of or relating to" the underlying contract. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. at 624 n.13 ("arising out of or relating to" is a "broad clause" applicable to antitrust claims); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.,* 388 U.S. 395, 398 (1967) ("arising out of or relating to" is a "broad" arbitration clause); *Genesco v. T. Kakiuchi & Co., Ltd.,* 815 F.2d 840, 855 (2d Cir. 1987) (language "sufficiently broad" to encompass fraudulent inducement claim). In order to determine whether the arbitration agreement in the Student Match Contract encompasses plaintiffs' claim as it relates to the NRMP, the Court must "focus on the factual allegations in the complaint rather than the legal causes of action asserted." *Genesco Inc. v. T. Kakiuchi & Co.,* 815 F.2d at 846. "If the allegations underlying the claims 'touch matters' covered by the parties' . . . agreement, then those claims must be arbitrated. . . ." *Id.* (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. at 624 n.13).

Upon review of the complaint, the Court concludes that plaintiffs' conspiracy claim does relate in part to the Student Match Contract. Although plaintiffs assert that the agreement merely serves as evidence of the conspiracy, the allegations of the complaint suggest much more. Plaintiffs expressly allege that forcing plaintiffs to execute the contract was itself an anticompetitive act. *See* Compl. ¶ 86(b) (Match Program "imposes anticompetitive restraints through several of its features including . . . forcing applicants to commit contractually to any assigned position as a condition of enrolling in the matching program"); ¶ 100(b) ("Defendants and members of the Defendant Class illegally restrain competition in a number of related ways, including . . . assigning prospective resident physician employees to positions through the NRMP.").[17] Where the execution of the contract is itself alleged to be an anticompetitive act, plaintiffs cannot argue that the claim does not arise from or relate to the agreement. *See*

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[17] For these purposes, any distinction between allegations concerning the Match Program and the Student Match Contract is artificial. *See* Compl. ¶ 15 ("The NRMP exists for the sole purpose of illegally restraining trade by eliminating competition in the recruitment and employment of resident physicians by assigning prospective resident physician employees to medical residency positions.").

Simula, Inc. v. Autoliv, Inc., 175 F.3d 716, 722 (9th Cir. 1999) (antitrust claim "arose in connection with" the contract where plaintiff alleged use of the agreement as an anticompetitive tool and court had to interpret agreement to determine whether competition was suppressed); *PPG Industries, Inc. v. Pilkington plc,* 825 F. Supp. 1465, 1478 (D. Ariz. 1993) (same).

The cases on which plaintiffs rely in support of their position that the Student Match Contract merely evidences the alleged conspiracy do not lead to a different conclusion. In those actions, plaintiffs' claims were separate from and tangential to the contracts containing the arbitration provisions. *See Telecom Italia, SPA v. Wholesale Telecom Corp.,* 248 F.3d 1109, 1116 (11th Cir. 2001) (no referral of claim of tortious interference with contract between plaintiff and third party on basis of arbitration provision in separate lease agreement between plaintiff and defendant in absence of charge that defendant used execution of lease agreement to interfere with third-party contract); *AlliedSignal, Inc. v. B.F. Goodrich Co.,* 183 F.3d 568, 573 (7th Cir. 1999) (antitrust claim asserting, *inter alia,* anticompetitive pricing not referable under arbitration agreement because underlying contract did not regulate pricing); *Ford v. NYLCare Health Plans of the Gulf Coast, Inc.,* 141 F.3d 243, 251 (5th Cir. 1998) (no arbitration of false advertising claim that could be maintained without reference to "legally irrelevant" service contract containing arbitration provision); *Coors Brewing Co. v. Molson Breweries,* 51 F.3d 1511, 1516 (10th Cir. 1995) (antitrust claims concerning defendant foreign brewer's alliance with rival domestic brewer unrelated to plaintiff's licensing agreement with foreign brewer and therefore not referable); *Swensen's Ice Cream Co. v. Corsair Corp.,* 942

F.2d 1307, 1310 (8th Cir. 1991) (no referral of antitrust claim charging defendant undermined distribution agreement and not the separate franchise agreement containing relevant arbitration clause). Here, the Student Match Contract, its terms and its execution are part of plaintiffs' conspiracy claim and therefore relate to the agreement.

C. *Countervailing Statutory or Policy Concerns*

In light of the Court's conclusion that plaintiffs' claim relates to the Student Match Contract, the Court must determine whether a countervailing statute or policy renders the claim nonetheless non-arbitrable. While plaintiffs acknowledge that antitrust claims are arbitrable as a matter of law, *see Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 629; *Kotam Electronics, Inc. v. JBL Consumer Products, Inc.*, 93 F.3d 724, 728 (11th Cir. 1996); *Armco Steel Co., L.P. v. CSX Corp.*, 790 F. Supp. 311, 317 (D.D.C. 1991), they assert that five countervailing policies direct the Court to deny the NRMP's motion to compel: (1) the arbitration provision improperly results from the "overwhelming economic power" of defendants; (2) NRMP policy requires that the parties share the costs of arbitration equally, which improperly restricts plaintiffs from pursuing their statutory claims; (3) the arbitration clause is unconscionable under Illinois law; (4) the arbitration clause is the result of duress under Illinois law; and (5) under Illinois law the Student Match Contract and its arbitration provision are unenforceable because they allegedly result from a violation of the antitrust laws. *See* Pls.' Arbit. Opp. at 18-28. Certain institutional defendants also filed a brief in opposition to the motion to compel, asserting that as a matter of Illinois law, a court and not an arbitrator must decide whether a contract is void as a violation of the antitrust laws. *See* Memorandum of Points and Authorities in Support of Opposition by Various Defendants to Motion to Compel Arbitration ("Inst. Defs.' Arbit. Mem.") at 1-2.

1. Federal Defense of "Overwhelming Economic Power"

Plaintiffs first assert that they were forced to enter the Student Match Contract and, by extension, the arbitration provision, by the "overwhelming economic power" defendants hold over "[f]ourth year medical students, like plaintiffs here, [who] have no practical choice but to sign the match application – with the 'boilerplate' arbitration clause on which NRMP relies which is presented to the medical students on a 'take it or leave it' basis." Pls.' Arbit. Opp. at 20-21. Plaintiffs argue that this imbalance in power between the NRMP and plaintiffs unlawfully denies them the right to vindicate their statutory rights under the Sherman Act. Plaintiffs rely on the Supreme Court's cautionary note in *Mitsubishi* that "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. at 627 (quoting 9 U.S.C. § 2). The Supreme Court subsequently has noted, however, that "[m]ere inequality in bargaining power [] is not a sufficient reason to hold that arbitration agreements are never enforceable. . . ." *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 33 (1991). *See also Cole v. Burns Int'l Security Service,* Civil No. 95-1785, 1996 U.S. Dist. LEXIS 22541, at *10-11 (D.D.C. Jan. 31, 1996), *aff'd,* 105 F.3d 1465 (D.C. Cir. 1997). In any event, the burden is on plaintiffs to demonstrate that this defense is "well-supported," *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 627, and they have failed to do so.

2. The NRMP "Fee-Splitting" Policy

Plaintiffs next argue that NRMP Policy 11.0, which is incorporated by reference in the Student Match Contract, frustrates the objectives of the Sherman Act because it requires plaintiffs to share equally in the costs of arbitration. *See* Pls.' Arbit. Opp. at 21. The Policy states that "[e]ach party shall share equally in the costs of arbitration." *See* Beran Compel. Aff., Ex. A-4, NRMP Policies in Effect for 1996 and 1997 Matches at 4.

Plaintiffs' "fee-splitting" claim does not survive scrutiny. While plaintiffs provide an affidavit detailing the possible costs of arbitration in this matter (*see* Pls.' Arbit. Opp., Affidavit of Michael L. Shakman), they offer no support for their assertion that the individual plaintiffs are unable to meet the anticipated costs. As the Supreme Court held in *Green Tree Financial Corp.-Alabama v. Randolph,* 531 U.S. 79, 92 (2000), "where a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." *See also Livingston v. Associates Finance, Inc.,* 339 F.3d 553, 557 (7th Cir. 2003) (plaintiffs' failure to provide details of financial resources under *Green Tree* defeats plaintiffs' claim).[18]

Furthermore, the NRMP has stated that if any plaintiff "can show the fees are unreasonable given their respective financial situations, the NRMP has offered to pay the individual claimant's share of the costs of the arbitrator's fees." Defendant National Resident Matching Program's Reply Brief on its Motion to Dismiss and to Compel Arbitration ("NRMP's Arbit. Reply") at 15. *See also* Tr. at 65 ("[E]ven if there were a burden there, it can be cured, and the NRMP has made the very offer that has been approved in other cases to waive that provision."). Where a party moving to compel arbitration offers to cover the costs of arbitration to the extent the opposing party demonstrates its inability to pay, the opposing party is foreclosed from arguing against arbitration on expense grounds. *See Livingston v. Associates Finance, Inc.*, 339 F.3d at 557. As Judge Walton concluded in *Nelson v. Insignia/Esg, Inc.*, 215 F. Supp. 2d 143, 157 (D.D.C. 2002), "even if the plaintiff had adequately demonstrated a *prima facie* showing of prohibitive expenses, the Court would conclude that the defendant's offer to pay all fees and expenses of arbitration effectively obviated any concerns the plaintiff may have raised regarding her ability to vindicate her claims in an arbitral forum because of the fee-splitting provision in the arbitration agreement." *Accord Nur v. K.F.C., USA, Inc.,* 142 F. Supp. 2d 48, 52 (D.D.C. 2001) (same). The Court thus concludes that the arbitration provision of the Student Match Contract cannot be voided on the basis of NRMP Policy 11.0.

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[18] Although the opinion of the D.C. Circuit in *Cole v. Burns International Security Services*, 105 F.3d at 1486, may be read to announce a *per se* rule prohibiting arbitration where a plaintiff is forced to pay arbitration costs in excess of the costs of litigation pursuant to the arbitration agreement, this decision does not relieve a plaintiff from the burden of demonstrating his or her inability to pay under *Green Tree*. *See LaPrade v. Kidder, Peabody & Co., Inc.*, 246 F.3d 702, 708 (D.C. Cir. 2001).

3. Unconscionability

Section 2 of the FAA provides that "a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Supreme Court has concluded that "the text of § 2 declares that state law may be applied '*if* that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.' Thus, generally applicable contract defenses, such as fraud, duress, or unconscionability, may be applied to invalidate arbitration agreements without contravening § 2." *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 686-87 (1996) (quoting *Perry v. Thomas,* 482 U.S. 483, 493 n.9 (1987)) (emphasis in original).

Plaintiffs assert that the arbitration provision in the Student Match Contract should not be enforced because it is unconscionable under Illinois law.[19] Specifically, they

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[19] It is undisputed that Illinois law applies to plaintiffs' contract-based claims pursuant to the choice of law provision in the Student Match Contract. *See* Beran Compel. Aff., Ex. A-1, 1998 Student Agreement of Plaintiff Denise Greene ("This agreement shall be governed by laws of the State of Illinois, but the Illinois conflicts of law

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argue that a gross disparity in bargaining positions existed between the NRMP and the medical students, that plaintiffs had no meaningful choice when presented with the Student Match Contract, and that the terms of the arbitration provision, "especially the fee-splitting requirement," are unreasonably favorable to defendants. Pls.' Arbit. Opp. at 26. The Supreme Court of Illinois has held that "a contract is unconscionable when it is improvident, oppressive, or totally one-sided. . . ." *The Streams Sports Club, Ltd. v. Richmond,* 457 N.E.2d 1226, 1232 (Ill. 1983) (internal citations omitted). Applying this standard, Illinois courts have found unconscionable those contracts that encompass "a lack of meaningful choice by one party," and that an unconscionable bargain is one "which no reasonable person would make, and no honest person would accept." *Saunders v. Michigan Avenue National Bank,* 662 N.E.2d 602, 610 (Ill. App. Div. 1996) (internal citation omitted). "Factors relevant to finding a contract unconscionable include gross disparity in the values exchanged or gross inequality in the bargaining positions of the parties together with terms unreasonably favorable to the stronger party." *Ahern v. Knecht,* 563 N.E.2d 787, 792 (Ill. App. Div. 1999).

The Court concludes that the arbitration provision of the Student Match Contract is not unconscionable under Illinois law. Plaintiffs make broad assertions that the agreement is "unreasonably favorable" to defendants and that plaintiffs had no meaningful choice when presented with the agreement. Under Illinois law, however, "mere disparity of bargaining power is not sufficient grounds to

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provision shall be not be construed to apply the law of any other jurisdiction.").

vitiate contractual obligations." *The Streams Sports Club, Ltd. v. Richmond,* 457 N.E.2d at 1232. Furthermore, "Illinois law does not void contracts where parties have unequal bargaining power, even if a contract is a so-called 'take-it-or-leave-it' deal and 'consent to [the] agreement is secured because of hard bargaining positions or the pressure of financial circumstances.'" *Koveleskie v. SBC Capital Markets, Inc.,* 167 F.3d 361, 367 (7th Cir. 1999) (quoting *Kewanee Prod. Credit Ass'n v. G. Larson & Sons Farms,* 496 N.E.2d 531, 534 (Ill. App. Div. 1986)). "'Rather, the conduct of the party obtaining the advantage must be shown to be tainted with some degree of fraud or wrongdoing in order have an agreement invalidated. . . . [T]he mere fact that a person enters into a contract as a result of the pressure of business circumstances . . . is not sufficient.'" *Koveleskie v. SBC Capital Markets, Inc.,* 167 F.3d at 367 (quoting *Kewanee Prod. Credit Ass'n v. G. Larson & Sons Farms,* 496 N.E.2d at 534). This is the case even if the contract is perceived to be a mandatory gateway to participation in a specific profession. *See Metro East Center for Conditioning and Health,* 294 F.3d 924, 926 (7th Cir. 2002).[20]

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[20] To the extent that plaintiffs substantially rest their unconscionability argument on the claim that the fee-splitting provision makes the arbitration agreement "oppressive" and "totally one-sided," Pls.' Arbit. Opp. at 26, the argument is rejected for the reasons stated in Section III(C)(2), *supra,* in view of the NRMP's offer to pay the individual plaintiffs' shares of the costs of arbitration.

4. Duress

Plaintiffs also argue that the arbitration agreement is unenforceable because it is a product of economic duress. Under Illinois law,

> [d]uress occurs where one is induced by a wrongful act or threat of another to make a contract under circumstances that deprive one of the exercise of one's own free will. To establish duress, one must demonstrate that the threat has left the individual bereft of the quality of mind essential to the making of a contract. The acts or threats complained of must be wrongful; however, the term "wrongful" is not limited to acts that are criminal, tortious, or in violation of a contractual duty. They must extend to acts that are also wrongful in a moral sense.

Krilich v. American National Bank and Trust Co. of Chicago, 778 N.E.2d 1153, 1162 (Ill. App. Div. 2002) (internal citation and quotation omitted). *See also Hurd v. Wildman, Harrold, Allen and Dixon,* 707 N.E.2d 609, 614 (Ill. App. Div. 1999).

Plaintiffs do not argue that they were actually threatened or forced to enter the Student Match Contract but suggest that they lacked "free will" in that they either could sign the contract or "surrender their plan to become physicians and forfeit the time and money that they had invested in medical school." Pls.' Arbit. Opp. at 27. Once again, however, under Illinois law "where consent to an agreement is secured merely because of hard bargaining positions or financial pressures, duress does not exist." *Hurd v. Wildman, Harrold, Allen and Dixon,* 707 N.E.2d at 614. In addition, plaintiffs' argument that the NRMP's conduct was "wrongful" in executing the Student Match

Contract because the contract allegedly formed part of the antitrust conspiracy is irrelevant to the duress analysis. The "wrongful" act for these purposes must relate to any intentional pressure or threats applied by the contracting party to enter into the agreement, not to the alleged "wrongfulness" of the underlying contract. *See id.* at 615 ("Unless wrongful or unlawful pressure is applied, there is no business compulsion or economic duress."). The Court therefore concludes that the arbitration provision is not voidable as a product of duress.

5. Avoidance of Arbitration Under Illinois Arbitration Law

Finally, plaintiffs assert that in analyzing the motion to compel, the Court should apply Illinois arbitration law pursuant to the general choice of law provision of the Student Match Contract, and that under Illinois law the Student Match Contract is not enforceable because the contract itself allegedly "results from defendants' violation of the antitrust laws." Pls.' Arbit. Opp. at 24. Certain of the institutional defendants make a somewhat similar argument, asserting that under Illinois law, a court – and not an arbitrator – must decide whether the Student Match Contract violates the antitrust laws. *See* Inst. Defs.' Arbit. Mem. at 1-2. Defendants respond that both arguments are foreclosed by the Supreme Court's decision in *Mastrobuono v. Shearson Lehman Hutton, Inc.,* in which the Court held that the parties' intent to incorporate state laws or rules regarding the scope of arbitration must be clear, and that a broad choice of law clause is insufficient to meet that requirement. *See* NRMP's Arbit. Reply at 20-21. Defendants assert that Illinois arbitration law therefore is not applicable here because the parties' intent to apply the state's arbitration law is not clearly demonstrated.

Plaintiffs and the institutional defendants primarily rely on *Armco Steel Co. v. CSX Corp.,* 790 F. Supp. at 319, in which Judge Hogan concluded that "the FAA does not compel parties to arbitrate when the parties have chosen to be governed by state law and the state law relieves the parties of the responsibility to arbitrate when there is an allegation that the contract itself is a product of a violation of the antitrust laws." Judge Hogan concluded that by including a general choice-of-law provision in the underlying contract, the parties "indicated their intention to arbitrate to the extent allowed by Ohio law." *Id.*

Four years after Judge Hogan decided *Armco,* however, the Supreme Court decided *Mastrobuono.* The dispute in *Mastrobuono* arose out of a standard form contract that expressly provided in a general choice of law clause that the contract was to be governed by the laws of the State of New York. The matter went to arbitration, and the arbitrators awarded punitive damages. Respondent moved for vacatur of the arbitration award on the ground that under New York law only courts may award punitive damages, a law that conflicted with the FAA rule allowing arbitrators to do so. *See Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. at 53. The district court granted respondent's motion, concluding that the general choice of law provision directed application of New York arbitration law to the arbitration matters. The Seventh Circuit upheld the decision to vacate the award, and appellants sought and obtained certiorari.

The Supreme Court first determined that nothing in the contract indicated that the parties affirmatively expressed their intent to preclude the arbitrator from awarding punitive damages notwithstanding the general choice of law provision. *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. at 62. The Court found that at most the general choice of law provision actually introduced an ambiguity into a contract that otherwise would have allowed for punitive damage awards, and in light of the strong federal policy favoring arbitration, any ambiguity had to be read in favor of arbitration and thus against application of New York law. *See id.; see also EEOC v. Waffle House, Inc.*, 534 U.S. at 293 n.9 (noting that *Mastrobuono* held that clear contractual language governs interpretation of arbitration agreements, but where choice of law provision is ambiguous the agreement must be read to favor arbitration under FAA). More specifically, the Court in *Mastrobuono* held that "the choice of law provision covers the rights and duties of the parties, while the arbitration clause covers arbitration" and its scope. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. at 64.

Numerous courts of appeals have concluded that *Mastrobuono* requires that the intent of the contracting parties to apply state arbitration rules or law to arbitration proceedings must be explicitly stated in the contract and that under *Mastrobuono,* a general choice of law provision does not evidence such intent. *See Sovak v. Chugai Pharmaceutical Co.,* 280 F.3d 1266, 1270 (9th Cir. 2002) ("[A] general choice-of-law clause within an arbitration provision does not trump the presumption that the FAA supplies the rules for arbitration."); *Roadway Package System, Inc. v. Kayser,* 257 F.3d 287, 288-89 (3d Cir. 2001) ("[A] generic choice-of-law clause, standing alone, is insufficient to support a finding that contracting parties intended to opt out of the FAA's default standards."); *UHC*

Management Co., Inc. v. Computer Sciences Corp., 148 F.3d 992, 997 (8th Cir. 1998) (finding general choice of law provision insufficient; court "will not interpret an arbitration agreement as precluding the application of the FAA unless the parties' intent that the agreement be so construed is abundantly clear"); *Ferro Corp. v. Garrison Industries, Inc.,* 142 F.3d 926, 936 (6th Cir. 1998) (rejecting general choice of law provision in absence of "indication that the parties intended to incorporate Ohio law to determine that the issue of fraudulent inducement should be adjudicated in a judicial forum"); *Porter Hayden Co. v. Century Indem. Co.,* 136 F.3d 380, 383 (4th Cir. 1998) ("[T]he choice-of-law provision in the [agreement] is neither an unequivocal expression of the parties' intent to commit adjudication of timeliness defenses to the court, rather than to an arbitrator, nor, more generally, an unequivocal expression of the parties' intent to invoke Maryland, rather than federal, arbitration law."); *National Union Fire Insurance Co. of Pittsburgh, Pa. v. Belco Petroleum Corp.,* 88 F.3d 129, 135 (2d Cir. 1996) ("[T]he choice-of-law clause is not an unequivocal inclusion of a New York rule that requires the preclusive effect of a prior arbitration to be decided by the court."); *PaineWebber Inc. v. Elahi,* 87 F.3d 589, 594 (1st Cir. 1996) (general choice of law provision did not indicate parties' intent to apply state rule requiring a judicial determination of effect of relevant clause).

In light of *Mastrobuono* and its progeny, the Court concludes that plaintiffs and the institutional defendants cannot rely on Judge Hogan's decision in *Armco* in support of their assertion that the general choice of law provision in the Student Match Contract suffices to demonstrate the parties' intent to apply Illinois law to define the scope of the arbitrator's authority. *Mastrobuono* requires more. *See Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. at 62; *see also Ferro Corp. v. Garrison Industries, Inc.,* 142 F.3d at 933 (district court's reliance on *Armco* in support of application of state arbitration law on basis of general choice of law provision was "misplaced . . . because [court] was bound to follow the Supreme Court's more recent decision [in *Mastrobuono*]").[21]

This Circuit's decision in *Ekstrom v. Value Health, Inc.,* 68 F.3d 1391 (D.C. Cir. 1995), is not to the contrary. In *Ekstrom,* the court of appeals considered the dismissal of the appellants' petition to vacate an arbitration award as untimely on the ground that Connecticut law restricted the time period within which a party could appeal an arbitration award to 30 days, a shorter period than allowed for under the FAA. The parties agreed that Connecticut substantive law on contracts and on arbitration applied, but appellants asserted that the statute of limitations question was procedural in nature under Connecticut law. *See id.* at 1394. The court of appeals concluded, however, that the statute of limitations issue was a substantive question under Connecticut law and therefore that Connecticut state arbitration laws applied. *See id.* at 1395. The court also concluded that the state law was not preempted by the FAA because no direct conflict existed in light of the parties' agreement to apply Connecticut substantive law. *See id.* at 1395-96. This Court concludes that *Ekstrom* is not inconsistent with *Mastrobuono.* *Mastrobuono* does not prevent parties from deciding that a state's arbitration law applies; it only requires that such a choice is expressed unequivocally, and the parties in *Ekstrom* expressly agreed that Connecticut substantive arbitration law applied. Here, by contrast, no such agreement exists. This Court therefore concludes that in this case federal arbitration law under the FAA defines the scope of the arbitrator's authority.[22]

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[21] Although the NRMP drafted the Match Contract, the Court concludes that the policy directing a court to hold ambiguity against the drafter does not outweigh the policies that heavily favor arbitration. *See Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. 468, 479 (1989).

The Court's conclusion is significant because federal law differs in substantial ways from Illinois law (as it is described by the non-moving parties) to the detriment of the non-moving parties' efforts to avoid arbitration. Plaintiffs assert that under Illinois law a party is relieved from an arbitration agreement if the underlying contract is alleged to be void for violation of the antitrust laws. Under the FAA, however, a party is not relieved from an agreement to arbitrate on the ground that the contract is allegedly void for violation of the antitrust laws unless plaintiffs demonstrate that the Court's enforcement of the arbitration provision would make the Court a party to the unlawful activity. *See Dickstein v. duPont,* 443 F.2d 783, 786 (1st Cir. 1971) (antitrust defenses to arbitration "allowed only in cases where the intrinsic illegality of the contract is so clear that enforcement would make a court party to the precise conduct forbidden by the law"); *In re Universal Service Fund Telephone Billing Practices Litigation,* No.

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[22] To the extent that other members of this Court have interpreted *Ekstrom* post-*Mastrobuono* to extend a general choice of law provision to matters concerning the scope of the arbitrator's authority, the undersigned respectfully disagrees. *See Int'l Technologies Integration, Inc. v. Palestinian Liberation Organization,* 66 F. Supp. 2d 3, 9 n.5 (D.D.C. 1999).

02-MD-1468, 2003 U.S. Dist. LEXIS 9235, at *9-11 (D. Kan. May 27, 2003) (finding arbitration clause enforceable, concluding that "a contract that is legal on its face and does not call for unlawful conduct in its performance is not voidable or unenforceable simply because it resulted from an antitrust conspiracy"). *See also Kelly v. Kosuga,* 358 U.S. 516, 518 (1959) ("[A] plea of illegality based on violation of the Sherman Act has not met with much favor in this Court."); *National Souvenir Center, Inc. v. Historic Figures, Inc.,* 728 F.2d 503, 514-16 (D.C. Cir. 1984) ("remote danger" that court would be a party to enforcing illegal restraint "outweighed by the probability that allowing the [antitrust] defense would let the buyer escape from its side of a bargain"). Plaintiffs have made no such showing. Similarly, while the institutional defendants assert that Illinois law requires a court to determine whether a contract violates the antitrust laws, federal law permits the arbitrator to make that determination. *See Simula, Inc. v. Autoliv, Inc.,* 175 F.3d at 721-22 (antitrust claim involving contract that allegedly functioned to restrain trade properly referred to arbitration); *Coors Brewing Co. v. Molson Breweries,* 51 F.3d at 1516 (same).[23]

D. *Compelling Countervailing Interest in the Proper Adjudication of Sherman Act Claims*

While the Court has concluded that the arbitration clause in the Student Match Contract encompasses the claim the NRMP seeks to have arbitrated, and that none of the countervailing statutory or policy considerations suggested by plaintiffs and certain institutional defendants relieve them from the responsibility to arbitrate, the Court nonetheless concludes that compelling arbitration of any part of the conspiracy claim would undermine the purposes of the Sherman Act by improperly compartmentalizing plaintiffs' single conspiracy claim. The Court also concludes that the request for arbitration by the AMA, a non-signatory to the Student Match Contract, would result in further improvident compartmentalizing of the claim.

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[23] Having determined that *Mastrobuono* precludes application of Illinois law relating to the scope of an arbitrator's authority, the Court does not reach the question of whether the parties accurately represented the status of Illinois law.

In its motion, the NRMP describes plaintiffs' conspiracy claim, designating three main elements: the use of the Match Program to eliminate competition in the recruitment and employment of medical residents, the exchange of competitively sensitive information regarding resident physician compensation and benefits, and the promulgation of and compliance with purportedly anticompetitive accreditation standards. *See* NRMP's Arbit. Mem. at 3-4. The NRMP asserts that "[t]ogether, these three elements of the supposed conspiracy are said to have 'the purpose and effect of artificially fixing, depressing, standardizing and stabilizing resident physician compensation and other terms of employment.'" *Id.* at 4 (quoting Compl. ¶ 101). Plaintiffs likely would not dispute this characterization of their claim. The NRMP then seeks an order "compelling plaintiffs to arbitrate the first element of their tripartite claim; namely, that defendants used the Matching Program to eliminate competition in the recruitment and employment of resident physicians.'" NRMP's Arbit. Mem. at 7. Characterizing plaintiffs' single conspiracy claim as "tripartite," however, cannot disguise the fact that plaintiffs' claim alleges a single conspiracy with three interacting prongs that – when considered together – are alleged to have the anticompetitive effect charged.

The Supreme Court has held that where certain claims within a multi-count complaint are arbitrable, the liberal federal policy favoring arbitration directs referral of those claims to arbitration "even where the result would be the possibly inefficient maintenance of separate proceedings in different forums." *Dean Witter Reynolds Inc. v. Byrd,* 470 U.S. 213, 217 (1985). *See also NPS Communications, Inc. v. The Continental Group, Inc.,* 760 F.2d 463, 465 (2d Cir. 1995) (retaining non-arbitrable antitrust claims while referring arbitrable contract claims to arbitration). In *Dean Witter,* the Supreme Court rejected the "doctrine of intertwining claims" as a defense to arbitration even when "piecemeal" litigation results, "at least absent a countervailing policy manifested in another federal statute." *Id.* at 221. Some courts also have concluded that "the Arbitration Act requires the separation of arbitrable 'issues' from non-arbitrable ones" within individual claims. *Rain v. The Donning Co./Publishers, Inc.,* 964 F.2d 1455, 1460 (4th Cir. 1992) (in single breach of contract claim alleging multiple bases for breach, referring to arbitration only those bases expressly arbitrable under relevant agreement).

It does not follow, however, that one element of an overarching conspiracy claim, an element in which multiple defendants allegedly are involved, should be referred to arbitration. Conspiracy is a far different creature from breach of contract, and conspiracy allegations in antitrust cases cannot be compartmentalized and considered in isolation "as if they were separate lawsuits, thereby overlooking the conspiracy claim itself." *In re Fine Paper Antitrust Litigation,* 685 F.2d 810, 822 (3d Cir. 1982).

Indeed, in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), the Supreme Court expressly held that in cases that involve an alleged conspiracy among multiple actors involving multiple acts,

> plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. . . . [I]n a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.

Id. at 699 (internal quotation and citation omitted). *See also In re Consumer Credit Counseling Services Antitrust Litigation,* Misc. No. 97-0233/Civil Action No. 97-1741, 1997 U.S. Dist. LEXIS 19669, at *13-14 (D.D.C. Dec. 4, 1997) (refusing to consider allegations of various anticompetitive acts separately when brought under single conspiracy claim, concluding that "the character and effect of the conspiracy are not to be evaluated by viewing its separate parts. . . . [T]he ramification and effect of the conspiracy should be looked at as a whole."); *In re Medical X-Ray Film Antitrust Litigation,* 946 F. Supp. 209, 218 (E.D.N.Y. 1996) (refusing to consider elements of conspiracy claim separately because "while each of these factors taken in isolation does not necessarily provide a basis alone for inferring an agreement or conspiracy, in combination, these factors, taken together and 'on the ground,' may support a reasonable inference that an agreement or conspiracy existed").

Chief Judge Hogan's decision in *In re Vitamins Antitrust Litigation,* Misc. No. 99-0197, 2000 U.S. Dist. LEXIS 7397 (D.D.C. May 9, 2000) is instructive on this issue. In that case, certain defendants moved to sever the allegations that related to those defendants in plaintiffs' single price-fixing conspiracy claim, arguing that not one but three conspiracies existed, each based on different vitamins produced. Relying on *Continental Ore,* Judge Hogan denied the motion to sever portions of the single conspiracy claim, concluding that "it would be improper . . . to prejudge the scope of the conspiracy that plaintiffs allege," and noting that "the trier of fact 'must look at the whole picture and not merely at the individual figures in it.'" *Id.* at *75 (quoting *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. at 699). The Court finds the *Continental Ore* directive even more compelling in the instant action, in which defendants assert that the alleged anticompetitive acts are facially lawful if considered separately. *See* Section IV(B)(3)-(5) *infra.* The Court concludes that the *Continental Ore* decision and its progeny manifest a clear and compelling countervailing interest in the comprehensive adjudication of conspiracy claims brought under the Sherman Act. Defendant NRMP's motion to compel arbitration therefore must be denied.

The Court also concludes that the request for arbitration made by the AMA, a non-signatory to the Student Match Contract, must be denied as well. The referral of the claim would further improperly compartmentalize plaintiffs' single conspiracy claim. Moreover, inasmuch as this request is predicated on a theory of derivative liability resulting from the AMA's role as a "governing sponsor" of the NRMP, the Court's conclusion that the claim as it relates to the NRMP is non-arbitrable also defeats these additional requests. *See* NRMP Arbit. Reply at 30-31. It also seems self-evident that entities that are not parties to a contract containing an arbitration agreement are not entitled to arbitrate their disputes. As the Supreme Court said in *Waffle House,* "[t]he FAA directs courts to place arbitration agreements on equal footing with other contracts, but it 'does not require parties to arbitrate when they have not agreed to do so.'" *EEOC v. Waffle House, Inc.,* 534 U.S. at 293 (quoting *Volt Information Sciences, Inc. v. Board of Trustees,* 489 U.S. at 478). None of the plaintiffs in this case has a contractual obligation to arbitrate any claims with the AMA and the Court will not require them to do so. *See Dayhoff, Inc. v. H.J. Heinz, Inc.,* 86 F.3d 1287, 1296-97 (3d Cir. 1996).

IV. DEFENDANTS' RULE 12(b)(6) MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM

Plaintiffs raise one claim of price-fixing against all defendants under Section 1 of the Sherman Act: "Defendants and others have illegally contracted, combined and conspired among themselves to displace competition in the recruitment, hiring, employment and compensation of resident physicians, and to impose a scheme of restraints[,] which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment." Compl. ¶ 2. Certain defendants have filed motions to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

A. *The Legal Framework*

1. Failure to State a Claim in the Antitrust Context

On a motion to dismiss for failure to state a claim under Rule 12(b)(6), the Court must assume the truth of the facts alleged in the complaint and may grant the motion only if it appears that plaintiffs will be unable to prove any set of facts that would justify relief. *See Summit Health, Ltd. v. Pinhas,* 500 U.S. 322, 325 (1991); *Browning v. Clinton,* 292 F.3d 235, 242 (D.C. Cir. 2002); *Haynesworth v. Miller,* 820 F.2d 1245, 1254 (D.C. Cir. 1987). The complaint must contain "either direct or inferential allegations respecting all material elements necessary to sustain a recovery under some viable legal theory." *In re Vitamins Antitrust Litigation,* 2000 U.S. Dist. LEXIS 7397, at *45. The complaint "is construed liberally in the plaintiffs' favor, and [the Court should] grant plaintiffs the benefit of all inferences that can be derived from the facts alleged." *Kowal v. MCI Communications Corp.,* 16 F.3d 1271, 1276 (D.C. Cir. 1994). *Accord Andrx Pharmaceuticals v. Biovail Corp. Int'l,* 256 F.3d 799, 805 (D.C. Cir. 2001) (same standard in antitrust context). The Court need not accept any inferences drawn by plaintiffs, however, "if such inferences are unsupported by the facts set out in the complaint. Nor must the Court accept legal conclusions cast in the form of factual allegations." *Andrx Pharmaceuticals v. Biovail Corp. Int'l,* 256 F.3d at 805 (quoting *Kowal v. MCI Communications Corp.,* 16 F.3d at 1276).

To survive a Rule 12(b)(6) motion in the antitrust context, plaintiffs must do more than simply paraphrase the language of the federal antitrust laws or state in conclusory terms that a defendant has violated those laws. *See Dial A Car, Inc. v. Transportation, Inc.,* 884 F. Supp.

584, 588 (D.D.C. 1995), *aff'd* 82 F.3d 484 (D.C. Cir. 1996). "If [a plaintiff] claims an antitrust violation, but the facts he narrates do not at least outline or adumbrate such a violation, he will get nowhere merely by dressing them up in the language of antitrust." *Sutliff, Inc. v. Donovan Companies, Inc.*, 727 F.2d 648, 654 (7th Cir. 1984). *See also TV Communications Network, Inc. v. Turner Network Television, Inc.*, 964 F.2d 1022, 1024 (10th Cir. 1992). "Conclusory allegations, in a complaint, if they stand alone, are a danger sign that the plaintiff is engaged in a fishing expedition." *DM Research, Inc. v. College of American Pathologists,* 170 F.3d 53, 55 (1st Cir. 1999). *See also GTE New Media Services Inc. v. Ameritech Corp.,* 21 F. Supp. 2d at 40. The Supreme Court has cautioned, however, that in the antitrust context, "where 'the proof is largely in the hands of the alleged conspirators,' dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 746 (1976) (quoting *Poller v. Columbia Broadcasting,* 368 U.S. 464, 473 (1962)).

2. Conspiracy in Restraint of Trade under Section 1

In order to state a claim of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act, plaintiffs must allege (1) that the defendants entered into some agreement, contract, combination, conspiracy or other concerted activity; (2) that at least one defendant committed an overt act in furtherance of the conspiracy; and (3) that the agreement constituted an unreasonable restraint of trade in the relevant market in a manner that had an impact on interstate commerce. *See Invamed, Inc. v. Barr*

Laboratories, Inc., 22 F. Supp. 2d 210, 221 (S.D.N.Y. 1998); *Dial A Car, Inc. v. Transportation, Inc.*, 884 F. Supp. at 591. Like other conspiracies, at the heart of an antitrust conspiracy is an agreement and a conscious decision by each defendant to join it. While an agreement in "restraint on trade is rarely evidenced by an express oral or written agreement," *Binder v. District of Columbia*, Civil Action No. 90-0255, 1991 U.S. Dist. LEXIS 7094, at *9 (D.D.C. May 22, 1991), plaintiffs must allege "that the challenged restraint is not the result of independent actions by the defendants," but rather that "the defendants consciously committed to a common agreement of an unreasonable restraint on trade." *GTE New Media Services Inc. v. Ameritech Corp.*, 21 F. Supp. 2d at 42 (citing *Monsanto v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 (1984)). In the Section 1 context, "'[p]roof of a tacit, as opposed to explicit, understanding is sufficient to show agreement.'" *Federal Trade Commission v. Mylan Laboratories, Inc.*, 62 F. Supp. 2d 25, 55 (D.D.C. 1999) (quoting *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)). Courts therefore "have . . . allowed 'inferences [to be] fairly drawn from the behavior of the alleged conspirators' to prove conspiracy." *See Binder v. District of Columbia*, 1991 U.S. Dist. LEXIS 7094, at *9 (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir. 1976)).

3. Inapplicability of *Matsushita* to Rule 12(b)(6) Motions

Two defendants, the ACGME and Yeshiva University ("Yeshiva"), argue that there is another element to the legal standard that plaintiffs must satisfy in order to survive a motion to dismiss in the antitrust context. Specifically, these defendants assert that there is a limitation on the inferences that the Court may make in consideration of their motions to dismiss that derives from the Supreme Court's decision in *Matsushita Electric Industrial Co. v. Zenith Radio Co.*, 475 U.S. 574 (1986). In *Matsushita,* the Supreme Court considered a Section 1 conspiracy claim in the summary judgment context, and concluded that if a plaintiff relies on circumstantial evidence of an agreement rather than express acts, and if the claim against a defendant appears implausible, a plaintiff has an additional evidentiary burden:

> [T]he absence of any plausible motive to engage in the conduct charged is highly relevant to whether a 'genuine issue for trial' exists within the meaning of Rule 56(e). Lack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.

Id. at 596-97. Thus, if it appears that a defendant lacks a plausible motive for engaging in anticompetitive conduct, in order to survive summary judgment a plaintiff must present evidence that "show[s] that the inference of conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents." *Id.* at 587. The ACGME and Yeshiva ask the Court to extend *Matsushita* to plaintiffs' initial pleading burden, thereby requiring plaintiffs to have put forth allegations in their complaint demonstrating the reasonableness of their conspiracy claim in comparison with potential competing inferences defendants may raise. *See* Memorandum of Defendant Accreditation Council for Graduate Medical Education in Support of Its

Motion to Dismiss ("ACGME (b)(6) Mem.") at 16; Defendant Yeshiva University's Memorandum in Support of Its Motion to Dismiss ("Yesh.(b)(6) Mem.") at 7-8.

The Court concludes that application of the *Matsushita* rule simply is not appropriate in the context of a motion to dismiss. A motion to dismiss for failure to state a claim generally is made before discovery and should be evaluated on the basis of the four corners of the pleading. *See Summit Health, Ltd. v. Pinhas,* 500 U.S. at 325; *Browning v. Clinton,* 292 F.3d at 242. A summary judgment motion commonly is filed after at least some discovery and it turns on whether there is a genuine issue of material fact for trial; it is only in that post-discovery context in which the plausibility of competing motives should be assessed. *See Eastman Kodak Co. v. Image Technical Services, Inc.,* 504 U.S. 451, 468 (1992) ("*Matsushita* demands only that the nonmoving party's inferences be reasonable in order to reach the jury, a requirement that was not invented, but merely articulated, in that decision. If the plaintiff's theory is economically senseless, no reasonable jury could find in its favor, and summary judgment should be granted.").

By contrast, plaintiffs are not required to set forth allegations of motive in their complaint in anticipation of what defendants may argue on a motion to dismiss are equally plausible explanations for the alleged conspiratorial activities. *See Atlantic Coast Airlines Holdings, Inc. v. Mesa Air Group, Inc.,* Civil Action No. 03-2198, 2003 U.S. Dist. LEXIS 22792 at **41-42 (D.D.C. Dec. 18, 2003) (rejecting applicability of *Matsushita* evidentiary burden on motion for preliminary injunction); *In re Compact Disc Minimum Advertised Price Antitrust Litigation,* 138 F. Supp. 2d 25, 27 (D. Me. 2001) (expressly rejecting application of *Matsushita* summary judgment evidentiary burden to conspiracy claim on motion to dismiss); *AD/SAT v. Associated Press,* 885 F. Supp. 511, 521 (S.D.N.Y. 1995) (plaintiff's conspiracy allegations "while sufficient to survive a motion to dismiss, [were] inadequate to defeat the . . . motion for summary judgment [under the *Matsushita* standard]"). Antitrust claims, like all other claims, are subject only to the notice pleading requirements of Rule 8 of the Federal Rules of Civil Procedure. *See Todd v. Exxon Corp.,* 275 F.3d 191, 198 (2d Cir. 2001) ("[A] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules."); *MCM Partners, Inc. v. Andrews-Bartlett & Associates,* 62 F.3d 967, 976 (7th Cir. 1995) ("[A]n antitrust plaintiff need not include the particulars of his claim to survive a motion to dismiss. . . . It is instead sufficient for the plaintiff to include in its complaint only a short and plain statement of the claim showing an entitlement to relief.") (internal quotation and citation omitted).[24]

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[24] The cases relied upon by defendants in support of their argument for application of *Matsushita* in the dismissal context do not convince the Court otherwise. In those decisions, the courts extended the plausibility analysis articulated in *Matsushita* to one of impossibility, effectively concluding that those plaintiffs' complaints failed to state a claim under Rule 12(b)(6). *See DM Research, Inc. v. College of American Pathologists,* 170 F.3d at 56 ("[A]n implausible conclusory assertion may turn out to be true . . . [b]ut the discovery process is not available where, at the complaint stage, a plaintiff has nothing more than unlikely speculations."); *TV Communications Network, Inc. v. Turner Network Television, Inc.,* 964 F.2d at 1026-27 ("Because [defendants] would have no rational motive to create such an environment, [plaintiff's] allegations do not provide an inference of specific intent to conspire to achieve the stated goal of the conspiracy [to monopolize pursuant to Section 2 of the Sherman Act]"); *United Magazine Co. v.*

(Continued on following page)

4. The Import of *Continental Ore* and *American Tobacco*

In *Continental Ore Co. v. Union Carbide & Carbon Corp.,* the Supreme Court held that in cases that involve an alleged conspiracy among multiple actors involving multiple acts,

> plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole . . . and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. at 699 (internal quotation and citation omitted). *See also In re Fine Paper Antitrust Litigation,* 685 F.2d at 822 (conspiracy allegations in antitrust cases can not [sic] be compartmentalized and considered seriatim "as if they were separate lawsuits, thereby overlooking the conspiracy claim itself"); *In re Medical X-Ray Film Antitrust Litigation,* 946 F. Supp. at 218 (same). Although *Continental Ore* was decided in the context of a motion for a

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Murdoch Magazines Distribution, Inc., 146 F. Supp. 2d 385, 402 (S.D.N.Y. 2001) ("Since, under any theory, plaintiffs [sic] alleged conspiracy to engage in predatory pricing is entirely unnecessary and makes no economic sense, plaintiffs fail to state a claim under section 1."). *See also Dial A Car, Inc. v. Transportation, Inc.,* 82 F.3d at 487 (While motions to dismiss should be granted sparingly, dismissal is appropriate where appellant "not only fails to allege any facts supporting its claim . . . , it also offers nothing to indicate that monopolization of the relevant market is even possible, let alone probable").

directed verdict after trial, its maxim has been applied in a variety of contexts, including in consideration of motions to dismiss. *See In re Consumer Credit Counseling Services Antitrust Litigation,* 1997 U.S. Dist. LEXIS 19669, at *13-14 (court cannot consider alleged anticompetitive acts separately on a motion to dismiss when those acts are alleged to be part of a single conspiracy claim); *In re Medical X-Ray Film Antitrust Litigation,* 946 F. Supp. at 218 (summary judgment); *ITT World Communications Inc. v. Western Union Telegraph Co.,* 524 F. Supp. 702, 704 (S.D.N.Y. 1981) (denying motion to dismiss). "[T]he character and effect of the conspiracy are not to be evaluated by viewing its separate parts. . . . [T]he ramification and effect of the conspiracy should be looked at as a whole." *In re Consumer Credit Counseling Services Antitrust Litigation,* 1997 U.S. Dist. LEXIS 19669, at *13-14. In analyzing defendants' Rule 12(b)(6) motions, the Court therefore will consider the allegations with respect to the individual defendants only in the context of the larger conspiracy alleged.

The Supreme Court also stated in *Continental Ore* that "acts which are in and of themselves legal lose that character when they become constituent elements of an unlawful scheme." *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. at 707. As the Court earlier had announced in *American Tobacco Co. v. United States,* 328 U.S. 781 (1946):

> It is not the form of the combination or the particular means used but the result to be achieved that the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or

> unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition.

Id. at 809. *See also In re Medical X-Ray Film Antitrust Litigation,* 946 F. Supp. at 218; *ITT World Communications Inc. v. Western Union Telegraph Co.,* 524 F. Supp. at 704.

Neither of these rules, however, relieves plaintiffs of the burden of adequately alleging that a conspiracy to restrain trade existed in the first instance and that each defendant knowingly joined or agreed to participate in the conspiracy. If plaintiffs fail to do so, neither *Continental Ore* nor *American Tobacco* shield plaintiffs' claims from dismissal. *See Southern Pacific Communications Co. v. American Telephone & Telegraph Co.,* 556 F. Supp. 825, 888 (D.D.C. 1983) ("[N]othing in *Continental Ore* requires a conclusion that a defendant that has not engaged in an unlawful conspiracy, and has committed *no* acts in themselves violative of the Sherman Act, could be found guilty of antitrust violations on some theory that the acts have 'synergistic effects' that convert lawful conduct into violations of law.") (emphasis in original).

B. *Organizational Defendants' Motions to Dismiss*

Plaintiffs have sued seven organizational defendants: (1) the American Hospital Association ("AHA"); (2) the American Board of Medical Specialties ("ABMS"); (3) the Council of Medical Specialty Societies ("CMSS"); (4) the American Association of Medical Colleges ("AAMC"); (5)

the American Medical Association ("AMA"); (6) the Accreditation Council for Graduate Medical Education ("ACGME"); and (7) the National Resident Matching Program ("NRMP"). Plaintiffs in their complaint allege that the AAMC "operates and manages" the Match Program, which functions to suppress competition in the hiring of medical residents by adopting policies that "restrict[] attempts by employers and applicants to withdraw from the matching program," that "prohibit [] employment agreements between [Match Program] participants outside the [M]atch," and that require "applicants to commit contractually to any assigned position as a condition of enrolling in the [Match Program]." Compl. ¶ 86(a), (b). Certain ACGME standards that limit the number of residents in any given program and limit the mobility of medical residents between programs allegedly further serve to suppress competition in the hiring and employment of medical residents. *See id.* ¶ 88. Plaintiffs charge that medical students are compelled to participate in the Match Program because "with few exceptions, only resident physicians who complete specified employment periods in ACGME-accredited institutions and programs or combined programs are eligible for ABMS-member board certification," and that the ACGME "encourages and/or requires participation in [the Match] as a condition of accreditation." *Id.* ¶¶ 87, 88(c).

Plaintiffs' claim is that the restrictive "one position" nature of the Match Program combined with the ACGME accreditation standards together foreclose any external pressure on the institutional defendants to raise compensation levels that would be generated by prospective medical residents with multiple employment offers and their attendant bargaining power. *See* Compl. ¶ 92. This allegedly allows for compensation to be stabilized at a depressed level, facilitated by the institutional defendants' receipt of the COTH Survey distributed by the AAMC and the FREIDA database maintained by the AMA, which both provide annual medical resident compensation information. *See id.* ¶ 80. Furthermore, the AAMC's and the AMA's dissemination of recent and current compensation information and the ACGME's review of individual residency programs' compensation policies allegedly provide the means by which the institutional co-conspirators' compensation levels are policed. *See id.* ¶¶ 73, 88(d). Plaintiffs allege that medical resident salaries are and essentially have been stabilized at artificially low rates for more than 30 years, notwithstanding differences between programs in program prestige, geographic location, resident merit and year of employment. *See id.* ¶¶ 92-96.

From these allegations, the Court concludes that plaintiffs adequately have alleged a common agreement to displace competition in the recruitment, hiring, employment and compensation of resident physicians and to impose a scheme of restraints, which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment among a number of the named organizational defendants and those institutional defendants that participated in the Match Program. The extent to which plaintiffs adequately have alleged that the organizational defendants participated in the conspiracy and which organizational defendants participated is the subject of the following analyses.[25]

All the organizational defendants but the NRMP have filed motions to dismiss for failure to state a claim under Rule 12(b)(6) of the Federal Rules of Civil Procedure. All of the movants except the ACGME assert that plaintiffs' claim based on the allegation that they are "governing sponsors" of the NRMP and the ACGME cannot survive scrutiny. The AAMC and the AMA also argue that their information exchange programs – in the case of the AAMC, the COTH Survey; in the case of the AMA, the FREIDA database – cannot form the basis of a Section 1 antitrust claim. The ACGME argues that its creation and enforcement of accreditation standards for resident medical programs is non-commercial conduct that is beyond the reach of the antitrust laws.

1. Motion to Dismiss of the AHA

The AHA moves to dismiss the claim against it on the ground that the only allegations in the complaint pertaining to it – namely that it is a "governing sponsor" of the NRMP and the ACGME – are insufficient to demonstrate its participation in an antitrust conspiracy. The AHA further argues that those generalized allegations in the complaint pertaining to all "defendants" are conclusory and also are insufficient to tie the association to the conspiracy. *See* Memorandum of American Hospital Association in Support of Its Motion to Dismiss for Failure to State a Claim ("AHA (b)(6) Mem.") at 1-2.[26]

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[25] Only one institutional defendant, Yeshiva University, separately moved to dismiss the complaint for failure to state a claim. Its arguments are addressed in Section IV(C), *infra*. Four other institutional defendants joined the motions to dismiss filed by the AAMC, the AMA and the ACGME. None of the joining institutional defendants, however, are similarly situated to the organizations such that dismissal of the organizational defendants would provide a basis for dismissal of the institutions, as is evident in the following pages.

Plaintiffs concede that they do not make any argument on the basis of the vicarious liability of the so-called governing sponsors for the actions of the NRMP or the ACGME or on the basis of any like doctrine. *See* Plaintiffs' Consolidated Brief in Opposition to Defendants' Rule 12(b)(6) Motions ("Pls.' (b)(6) Opp.") at 46. Instead, they assert that they have made specific allegations of direct participation by the AHA in the conspiracy. Yet plaintiffs offer only the following paragraphs of the complaint to tie the AHA to the alleged conspiracy: that the AHA is a "governing sponsor" of the NRMP and the ACGME (*see* Compl. ¶ 19); that "[d]efendants collectively design and implement [the Match Program] and collectively agree to and comply with its anticompetitive restrictions" (*see id.* ¶ 83); that "[d]efendants periodically refine the [Match Program] to strengthen and expand its anticompetitive effect and to close avenues of circumvention" (*see id.* ¶ 85); and that the Match Program "adopt[s] policies forcing the vast majority of prospective resident physicians to use the

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[26] Defendants AMA, AAMC, ABMS and CMSS moved to join AHA's motion to dismiss to the extent that plaintiffs' allegations pertain to them in their capacity as governing sponsors of the NRMP and the ACGME. *See* Memorandum of Defendant American Medical Association in Support of Its Motion to Dismiss the Complaint Against It for Failure to State a Claim Based on Maintenance of the FREIDA Database ("AMA (b)(6) Mem") at 5; Memorandum of Law in Support of Defendant American Association of Medical Colleges' Motion to Dismiss for Failure to State a Claim ("AAMC (b)(6) Mem.") at 21; ABMS Mot. at 2; CMSS Mot. at 2.

[Match Program] rather than attempting to find employment on their own" (*Id.* ¶ 86(a)). *See* Pls.' (b)(6) Opp. at 43-44 (quoting complaint).

Plaintiffs do not dispute the AHA's assertion that Illinois law, the state of incorporation of the AHA and the NRMP, does not recognize or otherwise define the term "governing sponsor." The meaning of the term "governing sponsor" is far from self-evident, and plaintiffs do not make any assertions with respect to what role governing sponsors play for either the NRMP or the ACGME. The Court will not speculate as to the purpose or activities of a "governing sponsor" or infer from this vague term that the AHA "designed and implemented" or "facilitated" the Match Program or that, through its "active governance" of the ACGME, the AHA "created" the allegedly anticompetitive accreditation standards. Pls.' (b)(6) Opp. at 44, 44 n.31, 45. While all inferences are to be drawn in favor of plaintiffs on a motion to dismiss, the Court will not draw inferences from such vague, unsupported allegations. *See Andrx Pharmaceuticals v. Biovail Corp. Int'l,* 256 F.3d at 805. Nor will the Court permit plaintiffs to supplement the bare and insufficient allegations in their complaint with additional assertions from their brief. It is "axiomatic that the complaint may not be amended by the briefs in opposition to a motion to dismiss." *Car Carriers, Inc. v. Ford Motor Corp.,* 745 F.2d 1101, 1107 (7th Cir. 1984); *see Coleman v. Pension Benefit Guaranty Corp.,* 94 F. Supp. 2d 18, 24 n.8 (D.D.C. 2000).

Furthermore, plaintiffs' use of the term "defendants" to refer to multiple defendants situated very differently from one another in the context of general and global allegations is insufficient either by itself or in combination with the allegations relating to "governing sponsor" to demonstrate a basis for the AHA's participation in the conspiracy. Plaintiffs cannot escape their burden of alleging that each defendant participated in or agreed to join the conspiracy by using the term "defendants" to apply to numerous parties without any specific allegations as to the AHA. *See Invamed, Inc. v. Barr Laboratories, Inc.,* 22 F. Supp. 2d at 221 ("The complaint fails to support the existence of conspiracy as it presents no facts that might establish any participation by [parent companies] save including them within the term 'defendants.' . . . [Plaintiff] has not alleged that the [parent companies] 'acted' in any way."). Although the Court must consider defendants' motions to dismiss in the context of the larger conspiracy, as discussed in Section IV(A)(4), *supra,* plaintiffs are not relieved from alleging that each individual defendant joined the conspiracy and played some role in it. *See Invamed, Inc. v. Barr Laboratories, Inc.,* 22 F. Supp. 2d at 221; *Southern Pacific Communications Co. v. American Telephone & Telegraph Co.,* 556 F. Supp. at 888.[27]

Plaintiffs' allegations themselves evidence the ambiguity inherent in the global term "defendants." Surely paragraph 83 of the complaint, for example, does not mean that all the defendants design the Match Program or that each defendant is in a position to implement it. *See* Compl. ¶ 83 ("Defendants collectively design and implement [the Match Program] and collectively agree to and comply with its anticompetitive restrictions."). Nor can paragraph 85 mean that each defendant "periodically refine[s] the matching program to strengthen and expand its anticompetitive effect," for not every defendant is in a position to do so. *Id.* ¶ 85. *Compare In re Magnetic Audiotape Antitrust Litigation,* 99 Civ. 1580, 2002 U.S. Dist. LEXIS 8366, at *14 (S.D.N.Y. May 9, 2002) (allegations concerning all "defendants" adequate where allegation addressed specific meeting of all defendants at which price-fixing conspiracy was established).

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[27] Plaintiffs' reference to the Court's decision in *In re Vitamins Antitrust Litigation,* 2000 U.S. Dist. LEXIS 7397, is misplaced. In that case, Chief Judge Hogan concluded that a plaintiff need not allege overt acts committed by each defendant in furtherance of a conspiracy. *See id.* at *53. He did not hold that plaintiffs need not plead that an individual defendant was a participant in the conspiracy in the first instance.

The Court concludes that plaintiffs' allegations with respect to the AHA are vague, conclusory and simply insufficient to meet plaintiffs' burden under Rule 12(b)(6) of the Federal Rules of Civil Procedure. The Court therefore grants defendant AHA's motion to dismiss for failure to state a claim.

2. Motions to Dismiss of the CMSS and the ABMS

Defendants CMSS and ABMS move to dismiss the complaint by joining in the motions of the AMA, the AAMC, the ACGME and the AHA. *See* CMSS Mot. at 2; ABMS Mot. at 2. Upon review of the complaint, the Court determines that the only explicit or implied reference to the CMSS in the complaint is an allegation defining the CMSS as "an Illinois not-for-profit corporation whose membership consists of 17 physician societies in specialties having a member board participating in ABMS. The CMSS is one of five governing sponsors of the NRMP and the ACGME." Compl. ¶ 21. Plaintiffs allege that the ABMS also is one of five governing sponsors of the NRMP and the

ACGME. *See id.* ¶ 20.[28] Plaintiffs further allege (1) that the ABMS is "an Illinois not-for-profit corporation whose membership consists of 24 recognized medical specialty certification boards in the United States" (*id.*); (2) that these medical specialty boards "develop and apply professional and education standards for the evaluation and certification of physician specialists" (*id.*); and (3) that "[s]pecialty certification by one of the ABMS-member boards is essential to graduating medical school seniors and other eligible prospective residents. ABMS-member boards, with few exceptions, accept only ACGME-accredited residency employment in satisfaction of certification requirements." *Id.* ¶ 69.

Even if these allegations adequately alleged that the 17 physician societies that are members of the CMSS or the 24 medical certification boards that are members of the ABMS were part of the conspiracy, the Court will not impute the activities of either organization's members to the organization itself absent allegations that the entity participated in the conspiracy. There are no such allegations in the complaint, and it is established that a trade association or like organization can be held liable "for concerted action" taken by its members in furtherance of a conspiracy only if the association "acted as an entity." *Alvord-Polk, Inc. v. F. Schumacher & Co.,* 37 F.3d 996, 1007 (3d Cir. 1994). "[C]oncerted action does not exist every time a trade association member acts or speaks," and an association cannot be held liable "for the actions of its individual members alone." *Id.; compare Mastercard*

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[28] The Court rejects plaintiffs' governing sponsor assertions with respect to the CMSS and the ABMS as insufficient for the reasons stated in Section IV(B)(1), *supra.*

Int'l Inc. v. Dean Witter, 93 Civ. 1478, 1993 U.S. Dist. LEXIS 11964, at *6-7 (S.D.N.Y. Aug. 27, 1993) (association comprised of horizontal competitors acting as a single entity under name of association in order to restrain trade subject to Section 1 scrutiny). For these reasons, together with those stated in Section IV(B)(1), *supra,* regarding governing sponsors, the Court concludes that plaintiffs have failed to state a claim against either the CMSS or the ABMS.

3. Motion to Dismiss of the AAMC

The AAMC asserts that only three allegations in the complaint pertain to it: (1) the AAMC "manage[s] and operate[s] the residency matching program of the NRMP" (Compl. ¶ 15); (2) the "AAMC is one of the five governing sponsors of both the NRMP and the ACGME" (*id.* ¶ 17); and (3) "the AAMC/COTH annually surveys members of the COTH Section" of the AAMC and then "publishes an annual report entitled 'Survey of Housestaff Stipends, Benefits and Funding,'" which includes, *inter alia,* historical (from 1968) and current national average salaries for first year residents as well as the average salaries for years one through six of the post graduate years of employment (*id.* ¶ 74). *See* AAMC (b)(6) Mem. at 3. In addition to these specific allegations cited by the AAMC, plaintiffs include introductory information about the AAMC, alleging that it is a not-for-profit corporation made up of a membership including "all 125 accredited medical schools (including those medical schools named as Defendants in this Complaint) and approximately 375 major teaching hospitals and health systems in the United

States (including those hospitals and health systems named as Defendants in this Complaint)." Compl. ¶ 17.[29]

With respect to the allegations concerning the COTH Survey, plaintiffs plead in detail the way in which the AAMC through the COTH Survey allegedly facilitates the conspiracy by annually gathering and disseminating medical resident compensation information. *See* Compl. ¶¶ 73-79, 81. Specifically, plaintiffs make the following allegations: The AAMC annually surveys the members of the COTH Section in July seeking compensation levels for the employment year that begins that month. *See id.* ¶ 74. Approximately 75% of all residents are employed by COTH Section members that the AAMC surveys. *See id.* ¶ 75. Based on the responses, the AAMC publishes the COTH Survey, which in addition to compensation information includes budgetary information detailing resident compensation as a percentage of total operating budgets, the ratio of resident benefits to salaries, and funding sources for resident salaries. *See id.* ¶ 77. The full Survey is distributed in October or November of that same year with a "preliminary report" containing only salary information issued some time prior to the full report. *Id.* ¶ 78. The information disseminated in the Survey is highly specific because once salary information is broken down into subsets, those subsets "consist of as few as five employers." *Id.* ¶ 76. As a function of the foregoing, the "annual survey data provide employers with a baseline for determining resident physician compensation for the upcoming year. The following year employers are provided with another survey report which establishes a new baseline. In this way, employers avoid straying from standardized compensation levels." *Id.* ¶ 79.

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[29] The Court rejects plaintiffs' "governing sponsor" allegations as insufficient for the reasons stated in Section IV(B)(1), *supra*, with respect to the AHA. The Court also rejects the allegation that the AAMC "manages and operates" the NRMP as insufficient because plaintiffs offer no support for this conclusory allegation.

The AAMC argues that plaintiffs have failed to state a claim against it because the allegations related to the COTH Survey concern only the exchange of information that is only in aggregated form, because the Survey includes no information on future compensation, because the information is readily available to the public, and because there is no allegation that the AAMC participated in any discussion of compensation information. *See* AAMC (b)(6) Mem. at 7-21. The AAMC maintains that the dissemination of this kind of information under such circumstances is not a violation of the antitrust laws.[30]

As a preliminary matter, the Court notes that the AAMC mischaracterizes plaintiffs' claim by limiting the scope of the claim to the allegations that explicitly name the AAMC. A more accurate characterization of plaintiffs' claim is that there exists an agreement to fix the compensation of resident physicians at an improperly depressed level and that the AAMC has participated in the conspiracy by facilitating the anticompetitive agreement through the creation and dissemination of the COTH Survey, which provides a mechanism by which compensation levels remain stabilized and depressed. Plaintiffs specifically allege that together the Match Program and the ACGME accreditation standards eliminate the possibility that prospective medical residents can use compensation as a bargaining chip in gaining employment or in negotiating the terms of employment, and that the compensation information disseminated by the AAMC assists in keeping compensation levels for resident physicians fixed. The AAMC's motion to dismiss must be viewed through the lens of this larger price-fixing charge, and through this lens the Court concludes that while plaintiffs have not alleged expressly that the AAMC agreed to join the conspiracy, it is reasonable to infer from the facts and circumstances detailed in the complaint that the AAMC, an organization whose membership includes the institutional defendants, annually collects and disseminates compensation information to its members in order to facilitate the alleged compensation-fixing agreement and to allow for internal policing of member co-conspirators.

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[30] Four institutional defendants have joined the AAMC's Rule 12(b)(6) motion to dismiss. *See* Defendant Beth Israel Medical Center's Notice of Joinder in Motions to Dismiss ("Beth Israel Joinder") at 1; Notice by Defendants Duke University Health System, Inc., and Mount Sinai School of Medicine of the City University of New York of Their Joinder in Motions to Dismiss ("Duke/Sinai Joinder") at 1; Defendant the New York and Presbyterian Hospital's Notice of Joinder in Motions to Dismiss ("NY/Presb. Joinder") at 1-2.

The AAMC argues that several facets of the COTH Survey preclude the Court from concluding that plaintiffs adequately have alleged that the AAMC participated in the conspiracy, but none of its arguments is persuasive. First, the fact that plaintiffs' allegations regarding the AAMC concern information dissemination does not prevent the Court from concluding that the AAMC participated in the conspiracy. While the sharing of pricing and other information often may serve legitimate purposes, *United States v. United States Gypsum Co.,* 438 U.S. 422, 443 n.16 (1978), "information exchange is an example of a facilitating practice that [in some circumstances] can help support an inference of a price-fixing agreement." *Todd v.*

Exxon Corp., 275 F.3d at 198. *See also Penne v. Greater Minneapolis Area Board of Realtors,* 604 F.2d 1143, 1148 (8th Cir. 1979) (exchange of price information among competitors, although not a *per se* violation, may carry with it "the potential for the development of concerted price-fixing arrangements which lie at the core of the Sherman Act's prohibitions") (internal quotation omitted). Second, the fact that the COTH Survey only offers aggregated information rather than employer-specific information does not mean that such information could not have been utilized to facilitate the price-fixing conspiracy. *See* AAMC (b)(6) Mem. at 14-15. To the contrary, plaintiffs expressly have alleged that "once salary information [in the COTH Survey] is broken down into subsets based on year of employment, region and ownership type, those subsets consist of as few as five employers." *See* Compl. ¶ 76. In similar circumstances other courts have found sufficient allegations of antitrust violations. *See Todd v. Exxon Corp.,* 275 F.3d at 212 (aggregated compensation data reducible to subsets consisting of three competitors facilitated price-fixing conspiracy).

Third, the fact that plaintiffs allege only the exchange of past and current price information – as contrasted with proposals for future price increases or announcements of new prices – does not defeat plaintiffs' claim that the information exchange facilitated the stabilization of medical resident compensation. As the Supreme Court has held, "[e]xchanges of current price information . . . have the greatest potential for generating anti-competitive effects and . . . have consistently been held to violate the Sherman Act." *United States v. United States Gypsum Co.,* 438 U.S. at 443 n.16. From plaintiffs' allegations regarding the COTH Survey, it is reasonable to infer that the annual nature of the survey provides the institutional defendant co-conspirators the information they need to keep compensation levels depressed; each institutional defendant is able to set compensation levels consistent with the previous year knowing that the levels will be checked against those of the coming year with the next Survey. *See United States v. Container Corp. of America,* 393 U.S. 333, 335 (1969) (exchange of historical and current price information anticompetitive because it "seemed to have the effect of keeping prices within a fairly narrow ambit"); *Todd v. Exxon Corp.,* 275 F.3d at 210.

Fourth, the fact that the information is publicly disseminated does not insulate the activity from consideration in the larger price-fixing claim. As the Ninth Circuit concluded in *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 906 F.2d 432 (9th Cir. 1990), "[t]he fact that it is feasible for the appellees to communicate the necessary price information through press releases does not 'immunize the exchange of price information from legal sanction [where] the conditions of the market suggest that the exchange promotes collusive rather than competitive pricing.'" *Id.* at 447 (quoting RICHARD POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 147 (Univ. Chi. Press 1976)). Here, the alleged conditions of the market suggest that the information exchange does not promote competitive compensation levels. In an unrestrained market, prospective residents ostensibly could use the information in the COTH Survey to better evaluate competing offers among institutional defendants and to conduct more informed negotiations with the residency programs. In the market as alleged in the complaint, however, prospective residents cannot utilize the information in such a manner because there are no competing offers; the Match requires prospective residents to commit to one position before their receive any offer of employment.

Finally, plaintiffs do not allege only that the dissemination of the COTH Survey allows the institutional defendants to set depressed compensation levels. Plaintiffs also allege that the COTH Survey provides a policing mechanism for the various institutions – a separate, second way in which plaintiffs charge that the AAMC's distribution of the COTH Survey facilitates the price-fixing conspiracy. *See* Compl. ¶ 73. With the annual COTH Survey the institutional defendants not only are able to gauge their own compensation levels on a regular basis, but also are able to monitor their co-conspirators to ensure that others are not departing upward from the depressed levels. Plaintiffs' allegation that "survey reports have at times included statistics on 'atypical' deviations from salary averages" underscores this point. *Id.* ¶ 81(b); *see Todd v. Exxon Corp.,* 275 F.3d at 212 ("Price exchanges that identify particular parties, transactions, and prices are seen as potentially anticompetitive because they may be used to police a secret or tacit conspiracy to stabilize prices."). Upon careful consideration of the AAMC's motion to dismiss for failure to state a claim, and granting all reasonable inferences in favor of plaintiffs as it must at this juncture, the Court will deny the AAMC's motion to dismiss.

4. Motion to Dismiss of the AMA

The AMA asserts that only two paragraphs in the complaint relate to it: (1) the allegation that it is a "governing sponsor" of both the NRMP and the ACGME (*see*

Compl. ¶ 18); and (2) the allegation that "employers have access to resident physician compensation information through an electronic database known as the Fellowship and Residency Electronic Interactive Database ('FREIDA'), which is maintained by the AMA." *Id.* ¶ 80.[31] According to plaintiffs, "[t]he information contained in FREIDA is not average or aggregated data. It is detailed and employer-specific." *Id.* The AMA argues that the FREIDA-based allegation fails to state a claim against the AMA. Like the AAMC, the AMA contends that plaintiffs have not alleged that the association entered into an agreement with competitors to fix medical resident compensation, but rather only that the AMA allegedly conspired to disseminate information. *See* AMA (b)(6) Mem at 5-6.[32]

For the reasons stated with respect to the AAMC's dissemination of compensation information in Section IV(B)(3), *supra,* the Court cannot conclude automatically that the AMA's dissemination of resident compensation information in the FREIDA database could not form the basis for an inference that the AMA participated in the alleged conspiracy.[33] The Court does conclude, however, that by contrast to the AAMC, there is such a paucity of detail in plaintiffs' complaint concerning the AMA that plaintiffs' conclusory allegations do not survive a motion to dismiss for failure to state a claim. Unlike the allegations related to the COTH Survey, plaintiffs fail to allege how the FREIDA database information is utilized and distributed in furtherance of the conspiracy; they allege only that resident physician compensation is available through the database. *Compare* Compl. ¶ 80 (single allegation indicating existence of FREIDA database) *with id.* ¶¶ 74-79, 81 (detailed description of how COTH Survey functions to facilitate alleged conspiracy). Furthermore, unlike the allegation concerning the AAMC's membership, the alleged membership of the AMA of individual "physicians and others in the health care field" does not lend support to an inference that the AMA participated in the alleged conspiracy. *See id.* ¶ 18. The Court therefore grants the AMA's motion to dismiss.[34]

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[31] Four institutional defendants have joined the AMA's Rule 12(b)(6) motion to dismiss. *See* Beth Israel Joinder at 1; Duke/Sinai Joinder at 1; NY/Presb. Joinder at 1-2.

[32] The AMA further argues that if the Court infers that the AMA was a member of the conspiracy through its maintenance of the FREIDA database, by analogy the publisher of the *American Lawyer*'s annual survey of salaries of first year law firm associates could not be dismissed from an antitrust case brought by associates challenging their compensation. *See* Reply Memorandum in Support of Motion of Defendant American Medical Association to Dismiss the Complaint Against It for Failure to State a Claim at 24. The Court disagrees. Unlike the medical profession, there is no institutional, national employment placement structure in place whereby law students interview with law firms, rank their preferences for employment and contractually commit to acceptance of a single position prior to receiving an offer into which the *American Lawyer*'s information enters. There also is no indication that law firm associates are underpaid.

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[33] In addition, whether the AMA's operation of the FREIDA database and the dissemination of database information is itself lawful is irrelevant. *See American Tobacco Co. v. United States,* 328 U.S. at 809 ("[I]f [otherwise lawful acts] are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."); *In re Medical X-Ray Film Antitrust Litigation,* 946 F. Supp. at 218; *ITT World Communications Inc. v. Western Union Telegraph Co.,* 524 F. Supp. at 704. For this reason, the AMA's argument set forth in its supplemental memorandum that plaintiffs allegedly conceded that the FREIDA database is lawful does not inform the Court's analysis. *See* Supplemental Memorandum of Defendant American Medical Association in Support of Its Motion to Dismiss the Complaint Against It for Failure to State a Claim at 2.

5. Motion to Dismiss of the ACGME

The ACGME moves to dismiss plaintiffs' claim against it on the ground that the creation and enforcement of accreditation standards for resident medical programs is non-commercial conduct that is beyond the reach of the antitrust laws. In addition, the ACGME argues that plaintiffs have failed to allege that the ACGME took part in any conduct outside of educational accreditation. *See* ACGME (b)(6) Mem. at 2.[35]

Plaintiffs allege in their complaint that the ACGME accreditation standards play a central role in the conspiracy to depress medical resident salaries. Broadly stated, plaintiffs allege that completion of an ACGME-accredited residency program is perceived by medical students as necessary to ultimate board certification and practice. *See* Compl. ¶¶ 69, 87. More specifically, plaintiffs allege that four elements of the accreditation process function to unlawfully restrain the commercial endeavor of employing resident physicians and to fix, depress and stabilize compensation and other terms of employment in several ways. *See id.* ¶ 88. Plaintiffs allege that the ACGME: (1) "has the authority to regulate the number of employment positions a particular program may offer, and exercises that authority;" (2) "imposes substantial obstacles to the ability of a resident physician to transfer from one employer to another during the period of residency, essentially making the NRMP assignment effective for the entire duration of the residency;" (3) "encourages and/or requires participation in the [Match Program by the institutional defendants] as a condition of accreditation;" and (4) "in reviewing compliance with accreditation standards" directly reviews compensation and other terms of employment "with the purpose and effect of fixing, depressing, standardizing and stabilizing such compensation and terms." *Id.* ¶¶ 88(a)-(d). In effect, plaintiffs allege that the ACGME aided in and enforced the conspiracy to depress the compensation of resident physicians by promulgating and enforcing accreditation standards (1) that directly aid in the suppression of competition in the employment and compensation of medical residents effectuated through the Match Program; and (2) that provide the ACGME the authority to review individual compensation levels for resident physicians in order to police compensation levels among its alleged co-conspirators.

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[34] The Court rejects plaintiffs' governing sponsor allegations as insufficient for the reasons stated in Section IV(B)(2), *supra*.

[35] Four institutional defendants have joined the ACGME's Rule 12(b)(6) motion to dismiss. *See* Beth Israel Joinder at 1; Duke/Sinai Joinder at 1; NY/Presb. Joinder at 1-2.

The ACGME is correct that actors in the educational world and/or professional associations have been held to be insulated from the antitrust laws if the activity at issue is non-commercial in nature. *See Marjorie Webster Junior College v. Middle States Association of Colleges and Secondary Schools, Inc.,* 432 F.2d 650, 654 (D.C. Cir. 1970) (absent commercial motive, process of accreditation presumptively is "distinct from the sphere of commerce; it goes rather to the heart of the concept of education itself"); *Selman v. Harvard Medical School,* 494 F. Supp. at 621 (medical school admissions "distinctly" non-commercial). It also is true, however, that in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 787 (1975), the Supreme Court expressly eliminated any blanket exception to the antitrust laws for professional educational entities, "learned professions," and professional associations, emphasizing that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act." *Id.* Since *Goldfarb,* educational entities often have been subjected to the antitrust laws if the activity at issue is determined to be commercial. *See National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma,* 468 U.S. 85, 98 (1984) (educational association restriction on members' participation in television market commercial); *Law v. National Collegiate Athletic Association,* 134 F.3d 1010, 1019 (10th Cir. 1998) (college athletic association restriction on salary of coaching staff commercial in nature); *United States v. Brown University,* 5 F.3d 658, 667 (3d Cir. 1993) (inter-university agreement limiting financial aid programs sufficiently commercial to be subject to antitrust laws).[36]

The applicability of the antitrust laws to educational and/or accreditation organizations is a question of fact. When such entities "perform acts that are the antithesis of commercial activity, they are immune from antitrust regulation. . . . This immunity, however, is narrowly circumscribed. It does not extend to commercial transactions with a 'public service aspect.' Courts classify a transaction as commercial or noncommercial based on the nature of the conduct in light of the totality of surrounding circumstances." *United States v. Brown University,* 5 F.3d at 666 (quoting *Goldfarb v. Virginia State Bar,* 421 U.S. at 787-88). *See also Association for Intercollegiate Athletics for Women v. National Collegiate Athletic Association,* 735 F.2d 577, 584-85 (D.C. Cir. 1984) ("Practices by non-profit organizations that economically disadvantage consumers are generally prohibited even though such practices may be designed to advance independent social or political values.").

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[36] "*Marjorie Webster* is of questionable vitality after *Goldfarb,* to the extent that it draws a bright line between education and business, or accreditation policy and commerce." *Welch v. American Psychoanalytic Association,* No. 85 Civ. 1651, 1986 U.S. Dist. LEXIS 27182, at *9 (S.D.N.Y. April 4, 1986). *See also Foundation for Interior Design Education Research v. Savannah College of Art & Design,* 244 F.3d 521, 530 (6th Cir. 2001).

Plaintiffs allege that certain ACGME accreditation standards have a clear impact on commerce because they facilitate and enforce the suppression of competition in the hiring, employment and compensation of resident physicians effectuated by the Match Program and allow the ACGME to monitor resident compensation. *See* Pls.' (b)(6) Opp. at 27-28. While the ACGME responds that it lacks a motive to conspire to depress salaries and compensation in the medical resident field and offers non-anticompetitive explanations for the existence of the accreditation standards, this is not the proper stage of the proceedings in which to evaluate motive or weigh countervailing explanations for actions allegedly taken in furtherance of the conspiracy. *See* Section IV(A)(3), *supra; see also Hamilton Chapter of Alpha Delta Phi, Inc. v. Hamilton College,* 128 F.3d 59, 66 (2d Cir. 1997) (in considering Rule 12(b)(6) motion, district court improperly relied on defendant's assertion that relevant activity concerned educational rather than commercial gain); *Welch v. American Psychoanalytic Association,* 1986 U.S. Dist. LEXIS 27182, at *19-20 ("[A]ntitrust actions involving motive and intent to conspire and injure . . . [are] particularly inappropriate for [dispositive motion] treatment.") (internal quotation omitted). Rather, the question at this stage is whether the allegations in plaintiffs' complaint provide an adequate basis from which the Court can infer that the ACGME participated in the charged conspiracy.

In *DM Research, Inc. v. College of American Pathologists,* Judge Boudin addressed the circumstances in which accreditation standards have been found to be anticompetitive. He noted that "[m]erely to say that the standards are disputable or have some market effects has not generally been enough to condemn them as 'unreasonable' under the Sherman Act." *DM Research, Inc. v. College of American Pathologists,* 170 F.3d at 57. Instead, "something else or more extreme is generally present in the cases that have condemned quality standards as anticompetitive." *Id.* In the instant case, plaintiffs have alleged "something else or more extreme." In their complaint plaintiffs have alleged that the ACGME standards directly limit competition in the hiring of medical residents by, *inter alia,* requiring prospective residents to contractually commit to any offers they receive through the Match Program and by providing for the ACGME's policing of institutional defendants' compensation levels. *See* Compl. ¶¶ 88(a)-(d). Upon consideration of the foregoing, in concert with plaintiffs' broader allegations of conspiracy, the Court concludes that plaintiffs have set forth allegations in their complaint from which it reasonably may be inferred that the ACGME is a member of the alleged conspiracy. If the facts prove otherwise after discovery, a motion for summary judgment will be appropriate.

C. *Yeshiva University's Motion to Dismiss*

Defendant Yeshiva University moves to dismiss for failure to state a claim on the ground that the complaint does not set forth any allegations connecting it to the alleged conspiracy. *See* Yesh. (b)(6) Mem. at 3. The only allegation in the complaint that explicitly concerns Yeshiva is that "[d]efendant Yeshiva University ('Yeshiva'), of which the Albert Einstein College of Medicine ('AEC') is a part, . . . through AEC, sponsors medical residency programs, employing members of the Plaintiff class. Yeshiva has contracted, combined and conspired with the named Defendants and others to restrain competition as alleged in this Complaint." Compl. ¶ 50.

Plaintiffs argue that this is enough to tie Yeshiva to the conspiracy because the term "defendants" as it is used throughout the complaint includes "employers of resident physicians, *entities related to and/or affiliated with such employers,* or professional organizations through which the illegal restraints set forth in this Complaint are accomplished." Pls.' (b)(6) Opp. at 50 (quoting Compl. ¶ 5) (emphasis added). Notwithstanding this general definition, the Court concludes that the complaint fails to allege adequately any claim against Yeshiva.

The only connection Yeshiva is alleged to have to the price-fixing conspiracy is that it "sponsors" the graduate medical education aspects of the AEC on behalf of the ACGME. *See* Compl. ¶ 50. In the complaint, however, a "Sponsoring Institution" is defined as an institution "operating medical residency programs in one or more specialties, as well as individual residency programs ('Sponsored Programs') affiliated with those and other institutions. . . ." *Id.* ¶ 16. Yeshiva does not fall into this category because it does not operate a medical residency program nor is it an individual residency program.[37] Any allegations concerning the activities of "Sponsoring Institutions" therefore do not pertain to Yeshiva. In addition, unlike the other institutional defendants, Yeshiva is not alleged to own or operate a hospital or health center, to employ medical residents or to participate in either the Match Program or the COTH Survey. Any allegations concerning these activities therefore also do not pertain to Yeshiva.

The only aspect of the alleged conspiracy that arguably may link Yeshiva to the conspiracy is that portion of the complaint that addresses the ACGME accreditation standards, because Yeshiva admits that it monitors residency program compliance with ACGME standards for the accreditation association. *See* Yesh. (b)(6) Mem. at 4. In that section of the complaint, however, plaintiffs set forth no allegations concerning entities like Yeshiva that monitor residency program compliance with ACGME standards on behalf of the ACGME. Even the allegation that expressly pertains to residency program compliance does not mention the existence or role of such a monitoring entity. Plaintiffs only allege that "in reviewing compliance with accreditation standards, the ACGME *directly* reviews compensation and other terms of employment with the purpose and effect of fixing, depressing, standardizing and stabilizing such compensation and terms." Compl. ¶ 88(d) (emphasis added).

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[37] Similarly, plaintiffs define the defendant class in relevant part as "all ACGME-accredited Sponsoring Institutions as of the date of certification of the Defendant Class, and entities that were ACGME-accredited Sponsoring Institutions at any time since May 7, 1998." *Id.* ¶ 58. Yeshiva therefore does not fall into the proposed defendant class because it is not a "sponsoring institution" as that term is defined.

Although plaintiffs assert that ACGME accreditation standards can regulate residency programs "only through conduits like Yeshiva," (Pls.' (b)(6) Opp. at 51), plaintiffs have not set forth any allegations in their complaint that describe or challenge the activities of such "conduits," or specifically of Yeshiva. The Court will not infer from the generalized allegations concerning the ACGME that a separate entity that monitors ACGME-accredited medical residencies on behalf of the ACGME participated in the conspiracy. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 527 (1983) ("It is not . . . proper to assume that [a plaintiff] can prove facts that it has not alleged or that the defendants have violated the antitrust laws in ways that have not been alleged."). Plaintiffs cannot reinforce their complaint by creatively recasting and embellishing the allegations of their complaint in their opposition brief. *See Car Carriers, Inc. v. Ford Motor Corp.,* 745 F.2d at 1107; *Coleman v. Pension Benefit Guaranty Corp.,* 94 F. Supp. 2d at 24 n.8. Even construing the complaint in a light most favorable to plaintiffs, the Court concludes that the complaint fails to state a claim for which relief can be granted against Yeshiva University.

V. CONCLUSION

For the foregoing reasons, the Court first concludes that it has personal jurisdiction over the following institutional defendants: Barnes Jewish-Hospital, Baylor College of Medicine, Beth Israel Deaconess Medical Center, Inc., Boston Medical Center Corp., Cedars-Sinai Medical Center, The Cleveland Clinic Foundation, Emory University, Rhode Island Hospital, Rush-Presbyterian-St. Luke's Medical Center, St. Louis University, Stanford Hospital & Clinics, Thomas Jefferson University Hospital, Inc., Administrators of the Tulane Educational Fund, University Hospitals of Cleveland, Inc. and Yale-New Haven Hospital, Inc. The Court therefore denies the motions to dismiss for lack of personal jurisdiction filed by those institutions under Rule 12(b)(2) of the Federal Rules of Civil Procedure. The Court concludes that it does not have personal jurisdiction over institutional defendant Washington University Medical Center and therefore grants its motion to dismiss.

The only two organizational defendants that have filed motions to dismiss for lack of personal jurisdiction are the American Board of Medical Specialties and the Council of Medical Specialty Societies. The Court concludes that it does not have personal jurisdiction over either organizational defendant and therefore grants those defendants' motions to dismiss for lack of personal jurisdiction.

Second, the referral to arbitration of any portion of plaintiffs' single conspiracy claim would be improper. The Court therefore has subject matter jurisdiction over plaintiffs' entire claim and denies defendant National Resident Matching Program's motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure and its motion to compel arbitration. It also denies the motion to compel arbitration filed by the American Medical Association.

Finally, the Court finds that plaintiffs adequately have alleged a common agreement to displace competition in the recruitment, hiring, employment and compensation of resident physicians and to impose a scheme of restraints that has the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment among certain defendants. Those defendants include movants the Association of American Medical Colleges and the Accreditation Council for Graduate Medical Education. Accordingly, the Court denies the motions to dismiss for failure to state a claim upon which relief can be granted filed by these two organizational defendants. Because plaintiffs have failed adequately to allege that movants the American Hospital Association, the American Medical Association or Yeshiva University participated in the conspiracy, the Court will grant the motions to dismiss for failure to state a claim filed by those defendants.

An Order consistent with this Opinion shall be issued this same day.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE:

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D., et al.,
Plaintiffs,
v.
ASSOCIATION OF AMERICAN MEDICAL COLLEGES, et al.,
Defendants.

Civil Action No. 02-0873 (PLF)

ORDER

(Filed Feb. 11, 2004)

For the reasons stated in the separate Opinion issued this same day, it is hereby

ORDERED that the Motion of the Defendant the Cleveland Clinic Foundation to Dismiss Plaintiffs' Complaints Against the Cleveland Clinic Foundation for Lack of Personal Jurisdiction [21-1] is DENIED; it is

FURTHER ORDERED that Defendant Beth Israel Deaconess Medical Center's Motion to Dismiss the Complaint [27-1] is DENIED; it is

FURTHER ORDERED that Defendant Boston Medical Center's Motion to Dismiss the Complaint [29-1] is DENIED; it is

FURTHER ORDERED that Defendant Rhode Island Hospital's Motion to Dismiss the Complaint [31-1] is DENIED; it is

FURTHER ORDERED that Defendant Thomas Jefferson University Hospital's Motion to Dismiss the Complaint [33-1] is DENIED; it is

FURTHER ORDERED that Defendant Yale-New Haven Hospital's Motion to Dismiss the Complaint [35-1] is DENIED; it is

FURTHER ORDERED that the Motion of the Association of American Medical Colleges to Dismiss for Failure to State a Claim [37-1] is DENIED; it is

FURTHER ORDERED that the Motion of American Hospital Association to Dismiss Plaintiffs' Complaint for Failure to State a Claim [40-1] is GRANTED; it is

FURTHER ORDERED that Yeshiva University's Motion to Dismiss the Complaint for Failure to State a Claim Upon Which Relief Can Be Granted [45-1] is GRANTED; it is

FURTHER ORDERED the Defendant Rush-Presbyterian-St. Luke's Medical Center's Motion to Dismiss Pursuant to Rule 12(b)(2) [47-1] is DENIED; it is

FURTHER ORDERED that Defendant National Resident Matching Program's Motion to Dismiss and to Compel Arbitration [49-1] is DENIED; it is

FURTHER ORDERED that Defendant Barnes-Jewish Hospital's Motion to Dismiss [50-1] is DENIED; it is

FURTHER ORDERED that Defendant Emory University's Motion to Dismiss [54-1] is DENIED; it is

FURTHER ORDERED that Defendant Stanford Hospital & Clinics' Motion to Dismiss [58-1] is DENIED; it is

FURTHER ORDERED that Defendant Administrators of the Tulane Educational Fund's Motion to Dismiss [61-1] is DENIED; it is

FURTHER ORDERED that Defendant Washington University Medical Center's Motion to Dismiss [63-1] is GRANTED; it is

FURTHER ORDERED that Defendant University Hospitals of Cleveland, Inc.'s Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2) [65-1] is DENIED; it is

FURTHER ORDERED that Defendant St. Louis University's Motion to Dismiss the Complaints for Lack of Personal Jurisdiction [69-1] is DENIED; it is

FURTHER ORDERED that the Motion of Council of Medical Specialty Societies to Dismiss the Complaint for lack of personal jurisdiction [71-1] is GRANTED; it is

FURTHER ORDERED that the Motion of Defendant American Medical Association to Dismiss the Complaints Against It for Failure to State a Claim and Conditional Motion to Compel Arbitration [83-1] is DENIED in part and GRANTED in part; the conditional motion to compel arbitration is DENIED; the motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim is GRANTED; it is

FURTHER ORDERED that the American Board of Medical Specialties' Motion to Dismiss the Complaint for lack of personal jurisdiction [89-1] is GRANTED; it is

FURTHER ORDERED that Baylor College of Medicine's Motion to Dismiss for Lack of Personal Jurisdiction [91-1] is DENIED; it is

FURTHER ORDERED that Defendant Cedars-Sinai's Motion to Dismiss the Complaints Pursuant to Fed. R. Civ. P. 12(b)(2) [92-1] is DENIED; and it is

FURTHER ORDERED that the Motion to Dismiss of Defendant Accreditation Council for Graduate Medical Education [104-1] is DENIED; it is

FURTHER ORDERED that this case is dismissed against the following defendants with prejudice: the American Hospital Association, Yeshiva University, and the American Medical Association; and it is

FURTHER ORDERED this case is dismissed against the following defendants without prejudice: Washington University Medical Center, the Counsel for Medical Specialty Societies, and the American Board of Medical Societies.

SO ORDERED.

PAUL L. FRIEDMAN
United States District Judge

DATE:

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7023 **September Term, 2005**

02cv00873

Filed On: July 25, 2006 [982161]

Paul Jung, M.D., et al.,
Appellees

v.

Association of American Medical Colleges, et al.,
Appellees

National Resident Matching Program,
Appellant

Consolidated with 04-7138

BEFORE: Randolph and Griffith, Circuit Judges, and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellant Paul Jung, M.D. et al's petition for rehearing filed June 30, 2006, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7023 **September Term, 2005**

02cv00873

Filed On: July 25, 2006 [982157]

Paul Jung, M.D., et al.,
Appellees

v.

Association of American Medical Colleges, et al.,
Appellees

National Resident Matching Program,
Appellant

Consolidated with 04-7138

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph, Rogers, Tatel, Garland,* Brown, Griffith and Kavanaugh, Circuit Judges, and Edwards, Senior Circuit Judge

ORDER

Upon consideration of appellant Paul Jung, M.D., et al's petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is **ORDERED** that the petition be denied.

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* Circuit Judge Garland did not participate in this matter.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Michael C. McGrail
Deputy Clerk

Statutory Provisions Involved in the Case

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared illegal."

* * *

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15 U.S.C. § 37b, Confirmation of antitrust status of graduate medical resident matching programs, provides:

(a) Findings and purposes

(1) Findings

Congress makes the following findings:

(A) For over 50 years, most United States medical school seniors and the large majority of graduate medical education programs (popularly known as "residency programs") have chosen to use a matching program to match medical students with residency programs to which they have applied. These matching programs have been an integral part of an educational system that has produced the finest physicians and medical researchers in the world.

(B) Before such matching programs were instituted, medical students often felt pressure, at an unreasonably early stage of their medical education, to seek admission to, and accept offers from, residency programs. As a result, medical students often made binding commitments before they were in a position to make an informed decision about a medical specialty or a residency program and before residency programs could make an informed assessment of students' qualifications. This situation was inefficient, chaotic, and unfair and it often led to placements that did not serve the interests of either medical students or residency programs.

(C) The original matching program, now operated by the independent non-profit National Resident Matching Program and popularly known as "the Match", was developed and implemented more than 50 years ago in response to widespread student complaints about the prior process. This Program includes on its board of directors individuals nominated by medical student organizations as well as by major medical education and hospital associations.

(D) The Match uses a computerized mathematical algorithm, as students had recommended, to analyze the preferences of students and residency programs and match students with their highest preferences from among the available positions in residency programs that listed them. Students thus obtain a residency position in the most highly ranked program on their list that has ranked them sufficiently high among its preferences. Each year, about 85 percent of participating United States medical students secure a place in one of their top 3 residency program choices.

(E) Antitrust lawsuits challenging the matching process, regardless of their merit or lack thereof, have the potential to undermine this highly efficient, pro-competitive, and long-standing process. The costs of defending such litigation would divert the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research. In addition, such costs may lead to abandonment of the matching process, which has effectively served the interests of medical students, teaching hospitals, and patients for over half a century.

(2) Purposes

It is the purpose of this section to –

(A) confirm that the antitrust laws do not prohibit sponsoring, conducting, or participating in a graduate medical education residency matching program, or agreeing to do so; and

(B) ensure that those who sponsor, conduct or participate in such matching programs are not subjected to the burden and expense of defending against litigation that challenges such matching programs under the antitrust laws.

(b) Application of antitrust laws to graduate medical education residency matching programs

(1) Definitions

In this subsection:

(A) Antitrust laws

The term "antitrust laws" –

(i) has the meaning given such term in subsection (a) of section 12 of this title, except that such term includes section 45 of this title to the extent such section 45 of this title applies to unfair methods of competition; and

(ii) includes any State law similar to the laws referred to in clause (i).

(B) Graduate medical education program

The term "graduate medical education program" means –

(i) a residency program for the medical education and training of individuals following graduation from medical school;

(ii) a program, known as a specialty or subspecialty fellowship program, that provides more advanced training; and

(iii) an institution or organization that operates, sponsors or participates in such a program.

(C) Graduate medical education residency matching program

The term "graduate medical education residency matching program" means a program (such as those conducted by the National Resident Matching Program) that, in connection with the admission of students to graduate medical education programs, uses an algorithm and matching rules to match students in accordance with the preferences of students and the preferences of graduate medical education programs.

(D) Student

The term "student" means any individual who seeks to be admitted to a graduate medical education program.

(2) Confirmation of antitrust status

It shall not be unlawful under the antitrust laws to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program. Evidence of any of the conduct described in the preceding sentence shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws.

(3) Applicability

Nothing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs.

(c) Effective date

This section shall take effect on April 10, 2004, shall apply to conduct whether it occurs prior to, on, or after April 10, 2004, and shall apply to all judicial and administrative actions or other proceedings pending on April 10, 2004.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D.
6901 Marbury Road
Bethesda, Maryland 20817

LUIS LLERENA, M.D.
2135 Bernays Drive
York, Pennsylvania 17404, and

DENISE GREENE, M.D.
530 South Prairie Flower
Turlock, California 95380

individually and on behalf of a class of persons similarly situated,

Plaintiffs,

v.

MEDSTAR-GEORGETOWN HOSPITAL MEDICAL CENTER, INC.
3800 Reservoir Road NW
Washington, D.C. 20007

GEORGE WASHINGTON UNIVERSITY
Office of General Counsel
2100 Pennsylvania Ave., N.W., Suite 525
Washington, D.C. 20052

MEDSTAR HEALTH, INC.
5565 Sterrett Place, 5th Floor
Columbia, Maryland 21044

Case Number
1:02CV00873

Judge:
Paul L. Friedman

Deck Type:
Antitrust

FIRST AMENDED CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

ADMINISTRATORS OF THE)
TULANE EDUCATIONAL FUND)
1430 Tulane Avenue)
New Orleans, Louisiana 70112)
)
BARNES-JEWISH HOSPITAL)
One Barnes-Jewish Hospital Plaza)
St. Louis, Missouri 63110)
)
BAYLOR COLLEGE OF MEDICINE)
Office of General Counsel)
One Baylor Plaza)
Houston, Texas 77030)
)
BETH ISRAEL DEACONESS)
MEDICAL CENTER, INC.)
330 Brookline Avenue)
Boston, Massachusetts 02105)
)
BETH ISRAEL MEDICAL)
CENTER)
10 Nathan D. Perlman Place)
New York, New York 10003)
)
BOSTON MEDICAL CENTER)
CORPORATION)
1 Boston Medical Center Place)
Boston, Massachusetts)
)
CEDARS-SINAI MEDICAL CENTER)
8700 Beverly Blvd., Suite 2112)
Los Angeles, California 90048)
)
THE CLEVELAND CLINIC)
FOUNDATION)
9500 Euclid Avenue)
Cleveland, Ohio 44195)
)
DUKE UNIVERSITY HEALTH)
SYSTEM, INC.)
DUMC Box 3701)
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EMORY UNIVERSITY
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HENRY FORD HEALTH SYSTEM
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Detroit, Michigan 48202

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GENERAL HOSPITAL
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THE MCGAW MEDICAL CENTER
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UNIVERSITY
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THE MOUNT SINAI SCHOOL
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UNIVERSITY OF NEW YORK
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Presbyterian Hospital
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LUKE'S MEDICAL CENTER)
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221 North Grand Blvd.)
St. Louis, Missouri 63103)

STANFORD HOSPITAL)
AND CLINICS)
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Stanford, California 94305)

STRONG MEMORIAL HOSPITAL)
OF THE UNIVERSITY OF)
ROCHESTER)
Office of the General Counsel)
601 Elmwood Avenue)
Rochester, New York 14642)

THOMAS JEFFERSON)
UNIVERSITY HOSPITAL, INC.)
111 S. 11th Street)
Philadelphia, Pennsylvania 19107)

UNIVERSITY HOSPITALS)
OF CLEVELAND, INC.)
10524 Euclid Avenue, Suite 1100)
Cleveland, Ohio 44106)

WILLIAM BEAUMONT HOSPITAL)
16500 W. Twelve Mile Road)
P.O. Box 5072)
Southfield, Michigan 48086)

YALE-NEW HAVEN HOSPITAL, INC.)
20 York Street)
New Haven, Connecticut 06504, and)
)
individually and on behalf of a)
class of entities similarly situated, and)
)
ASSOCIATION OF AMERICAN)
MEDICAL COLLEGES)
2450 N Street, NW)
Washington, D.C. 20037-1126)
)
AMERICAN MEDICAL)
ASSOCIATION)
515 N. State Street)
Chicago, Illinois 60610)
)
ACCREDITATION COUNCIL)
FOR GRADUATE MEDICAL)
EDUCATION)
515 N. State Street, Suite 2000)
Chicago, Illinois 60610-4322)
)
and)
)
As to Count II Only:)
)
NATIONAL RESIDENT)
MATCHING PROGRAM)
2450 N Street, NW)
Washington, D.C. 20037-1127)
)
Defendants.)

Plaintiffs Paul Jung, M.D., Luis Llerena, M.D., and Denise Greene, M.D., individually and on behalf of a class of persons similarly situated, state against Defendants as follows:

OVERVIEW

1. Plaintiffs in this First Amended Complaint bring a new price-fixing claim under the federal antitrust laws. Count I, the new claim, alleges price-fixing for the compensation of resident physicians through the cumulative effect of several mechanisms, which together constitute and show a greater, comprehensive price-fixing scheme among all Defendants to restrain resident compensation in violation of Section 1 of the Sherman Act. Specifically, Count I alleges a nationwide priced-fixing scheme among Defendants through (a) the exchange of resident compensation information in the AAMC/COTH Survey; (b) the exchange of resident compensation information in the AMA/AAMC National GME Census; (c) a wage-restrictive AMA "Salary Guideline" and a wage-restrictive AMA "ethical rule"; and (d) certain wage-restrictive ACGME accreditation policies and procedures. Count II simply repleads the claim contained in the Plaintiffs' original complaint in order to preserve it for appeal.

2. Plaintiffs bring Count I against the hospital and medical school defendants and Defendants AAMC, AMA and ACGME (collectively "Defendants")[*] under the federal antitrust laws for: (a) money damages and other appropriate relief to compensate resident physicians for the harm they suffered as a result of a longstanding, nationwide

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[*] The National Resident Matching Program is not a defendant to Count I, and is named as a defendant in this Amended Complaint only for purposes of preserving plaintiffs' original claim (Count II herein) for appeal.

contract, combination and conspiracy among these Defendants to fix prices for the compensation of resident physicians; and (b) injunctive relief to end the illegal price-fixing activities.

3. [sic]

4. Defendants and others have illegally contracted, combined and conspired among themselves to design, implement and maintain certain mechanisms which have the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation and other terms of employment. The hospital and medical school defendants ("Institution Defendants") and Defendants AAMC, AMA and ACGME ("Organization Defendants") have each consciously joined the others in these agreements to fix prices on resident wages. Defendants' agreements are embodied in formal contracts and informal agreements and are demonstrated by Defendants' actions as described in detail herein.

5. Each of the named Plaintiffs and members of the Plaintiff Class is currently, or was recently, employed as a resident physician and has been injured by Defendants' illegal contract, combination and conspiracy to fix prices on resident wages.

6. Each of the named Defendants and members of the Defendant Class directly participates in the illegal contract, combination and conspiracy alleged herein and is either employers of resident physicians, entities related to and/or affiliated with such employers, or professional organizations through which the illegal price-fixing set forth in this Complaint is accomplished.

JURISDICTION AND VENUE

7. Plaintiffs bring this action pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain injunctive relief and to recover damages, including treble damages, costs of suit, and reasonable attorneys' fees, against the named Defendants and members of the Defendant Class for injuries sustained by the named Plaintiffs and the Plaintiff Class as a result of violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, as alleged herein.

8. [sic]

9. Personal jurisdiction exists over all Defendants pursuant to § 12 of the Clayton Act, 15 U.S.C. § 22, and the District of Columbia Long-Arm Statute, D.C. Code § 13.423.

10. Venue is proper in this Court pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. §§ 1391(b) and (c). Each of the named Defendants maintains offices, has representatives, may be found, and/or transacts business within this District within the meaning of Section 12 of the Clayton Act, 15 U.S.C. § 22.

11. Each of the named Defendants and members of the Defendant Class illegally contract, combine and conspire with persons and entities that have committed, and continue to commit, overt acts within the District of Columbia in furtherance of the contract, combination and conspiracy alleged in this Complaint. More specifically:

a. The AAMC/COTH Survey is operated, coordinated and/or supervised, in whole or in part, from within the District of Columbia by Defendant AAMC, which is headquartered in the District. From within the District and through the AAMC/COTH Survey, the AAMC participates in fixing and monitoring resident wages nationwide. Additionally, entities located within the District, including Defendants MedStar-Georgetown, GWU and MedStar-Washington Hospital Center and/or their affiliates, are members of AAMC/COTH, participate in the Survey, and/or use its information for purposes of fixing prices for resident wages paid within the District;

b. The AMA/AAMC National GME Census is operated, coordinated and/or supervised, in whole or in part, from within the District of Columbia by Defendant AAMC, which is headquartered in the District. From within the District and through the AMA/AAMC National GME Census, the AAMC participates in fixing and monitoring resident wages nationwide. Additionally, entities located within the District, including Defendants MedStar-Georgetown, GWU and MedStar-Washington Hospital Center and/or their affiliates, participate in the Census and/or use its information for purposes of fixing prices for resident wages paid within the District. Indeed, the AMA FREIDA database, which makes certain National GME Census information publicly available, contains information for each of the Institution Defendants and/or their affiliates, demonstrating their participation in the National GME Census;

c. The AMA maintains an office and operates within the District of Columbia. Additionally, its wage-related "salary guideline" and ethical rule are agreed to and complied with by entities located within the District, including Defendants MedStar-Georgetown, GWU and MedStar-Washington Hospital Center and/or their affiliates, and the guideline and rule are used for purposes of fixing prices for resident wages paid within the District.

Additionally, the AAMC's wage-monitoring activities from within the District relating to the AAMC/COTH Survey and AMA/AAMC Census serve to assist the price-fixing accomplished through the AMA's wage-related "salary guideline" and ethical rule.

d. The ACGME operates within the District of Columbia. Additionally, the wage-restrictive ACGME accreditation policies and procedures are agreed to and complied with by entities located within the District, including Defendants MedStar-Georgetown, GWU and MedStar-Washington Hospital Center and/or their affiliates, and these policies and procedures are used for purposes of fixing prices for resident wages paid within the District. Additionally, the AAMC's wage-monitoring activities from within the District relating to the AAMC/COTH Survey and AMA/AAMC Census serve to assist the price-fixing accomplished through the ACGME's wage-restrictive accreditation policies and procedures.

12. Members of the Plaintiff Class have been injured within the District of Columbia as a result of Defendants' illegal price-fixing contract, combination and conspiracy. Compensation paid to residents within the District of Columbia is fixed, depressed, standardized and stabilized.

PLAINTIFFS

13. Plaintiff Paul Jung, M.D., is an internal medicine physician who recently completed employment in a medical residency program and a medical fellowship. In June 2002, he completed two years as a Robert Wood Johnson Clinical Scholar at The Johns Hopkins University in Baltimore, Maryland. In June 2000, Dr. Jung completed

a three-year, ACGME-accredited Internal Medicine residency program at MetroHealth Medical Center in Cleveland, Ohio.

14. Plaintiff Luis Llerena, M.D., is a surgeon who recently completed employment in a medical residency program and a medical fellowship. In June 2003, he completed a two-year, ACGME-accredited Trauma/Critical Care fellowship program at Orlando Regional Medical Center in Orlando, Florida. In June 2001, Dr. Llerena completed a five-year, ACGME-accredited Surgery residency program at Cooper Hospital in Camden, New Jersey, after spending his first three post-graduate years employed as a resident in an ACGME-accredited Surgery program at MCP Hahnemann Hospital in Philadelphia, Pennsylvania.

15. Plaintiff Denise Greene, M.D., is a psychiatrist and family practice physician who recently completed employment in a medical residency program. In June, 2003 she completed a five-year residency program combined of ACGME-accredited Family Practice and Psychiatry residency programs at the University of California-Davis.

16. As set forth below, the proposed Plaintiff Class (collectively "resident physicians" or "residents") consists of all persons employed as resident physicians in ACGME-accredited residency programs (including programs combined of ACGME-accredited programs and subspecialty programs commonly referred to as fellowships) since May 7, 1998.

DEFENDANTS

17. Each of the named Defendants and members of the Defendant Class operates medical residency programs, employs resident physicians and/or is involved with setting and/or policing the wages and/or terms and conditions of employment of resident physicians. All have contracted, combined and conspired to fix, depress, standardize and stabilize compensation for resident physicians and to fix and impair other terms of their employment.

Institution Defendants

18. Defendant MedStar-Georgetown Hospital Medical Center, Inc. ("MedStar-Georgetown") is a District of Columbia not-for-profit corporation with its principal place of business in Washington, D.C. MedStar-Georgetown sponsors medical residency programs, employing members of the Plaintiff Class. MedStar-Georgetown has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint.

19. Defendant George Washington University, of which the George Washington University School of Medicine ("GWU") is a part, is a District of Columbia not-for-profit corporation with its principal place of business in Washington, D.C. George Washington University, through GWUSM, sponsors medical residency programs, employing members of the Plaintiff Class. George Washington University has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint.

20. [sic]

21. Defendant MedStar Health, Inc. ("MedStar-Washington Hospital Center") is a Maryland not-for profit healthcare corporation registered in the District of Columbia as a foreign corporation and doing business in the District of Columbia as Washington Hospital Center. MedStar Health sponsors medical residency programs, employing members of the Plaintiff Class. It has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint.

22. Defendant Administrators of the Tulane Educational Fund ("Tulane"), which operates the Tulane University School of Medicine, is a Louisiana not-for-profit corporation with its principal place of business in New Orleans, Louisiana. Tulane, through the Tulane University School of Medicine, sponsors medical residency programs, employing members of the Plaintiff Class. Tulane has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

23. Defendant Barnes-Jewish Hospital is a Missouri not-for-profit corporation with its principal place of business in St. Louis, Missouri. Barnes-Jewish Hospital sponsors medical residency programs, employing members of the Plaintiff Class. Barnes-Jewish Hospital has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the

conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

24. Defendant Baylor College of Medicine ("Baylor") is a Texas not-for-profit corporation with its principal place of business in Houston, Texas. Baylor, through its affiliated hospitals, sponsors medical residency programs, employing members of the Plaintiff Class. Baylor has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

25. Defendant Beth Israel Deaconess Medical Center, Inc. ("Beth Israel Deaconess") is a Massachusetts not-for-profit corporation with its principal place of business in Boston, Massachusetts. Beth Israel Deaconess sponsors medical residency programs, employing members of the Plaintiff Class. Beth Israel Deaconess has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

26. Defendant Beth Israel Medical Center ("Beth Israel") is a New York not-for-profit corporation with its principal place of business in New York, New York. Beth Israel sponsors medical residency programs, employing members of the Plaintiff Class. Beth Israel has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

27. Defendant Boston Medical Center Corporation ("Boston Medical Center") is a Massachusetts not-for-profit corporation with its principal place of business in Boston, Massachusetts. Boston Medical sponsors medical residency programs, employing members of the Plaintiff Class. Boston Medical has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

28. Defendant Cedars-Sinai Medical Center ("Cedars-Sinai") is a California not-for-profit corporation with its principal place of business in Los Angeles, California. Cedars-Sinai sponsors medical residency programs, employing members of the Plaintiff Class. Cedars-Sinai has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as

alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

29. Defendant The Cleveland Clinic Foundation ("Cleveland Clinic") is an Ohio not-for-profit corporation with its principal place of business in Cleveland, Ohio. The Cleveland Clinic sponsors medical residency programs, employing members of the Plaintiff Class. The Cleveland Clinic has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

30. Defendant Duke University Health System, Inc. ("Duke") is a North Carolina not-for-profit corporation with its principal place of business in Durham, North Carolina. Duke sponsors medical residency programs, employing members of the Plaintiff Class. Duke has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

31. Defendant Emory University ("Emory"), of which the Emory School of Medicine is a part, is a Georgia not-for-profit corporation with its principal place of business in Atlanta, Georgia. Emory, through the Emory School of Medicine, sponsors medical residency programs, employing members of the Plaintiff Class. Emory has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

32. Defendant Henry Ford Health System ("Henry Ford") is a Michigan not-for-profit corporation with its principal place of business in Detroit, Michigan. Henry Ford sponsors medical residency programs, employing members of the Plaintiff Class. Henry Ford has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

33. Defendant The Massachusetts General Hospital ("Massachusetts General") is a Massachusetts not-for-profit corporation with its principal place of business in Boston, Massachusetts. Massachusetts General sponsors medical residency programs, employing members of the Plaintiff Class. Massachusetts General has contracted,

combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

34. Defendant The McGaw Medical Center of Northwestern University ("McGaw") is an Illinois not-for-profit corporation with its principal place of business in Chicago, Illinois. McGaw consists of a consortium of hospitals and Northwestern University, which sponsors medical residency programs, employing members of the Plaintiff Class. McGaw has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

35. Defendant The Mount Sinai School of Medicine of the City University of New York ("Mount Sinai") is a New York not-for-profit corporation, with its principal place of business in New York, New York. Mount Sinai sponsors medical residency programs, employing members of the Plaintiff Class. Mount Sinai has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were

committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

36. Defendant The New York and Presbyterian Hospital ("New York Presbyterian") is a New York not-for-profit corporation with its principal place of business in New York, New York, [sic] New York Presbyterian sponsors medical residency programs, employing members of the Plaintiff Class. New York Presbyterian has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

37. Defendant Rhode Island Hospital is a Rhode Island not-for-profit corporation with its principal place of business in Providence, Rhode Island. Rhode Island Hospital sponsors medical residency programs, employing members of the Plaintiff Class. Rhode Island Hospital has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

38. Defendant Rush-Presbyterian-St. Luke's Medical Center ("Rush-Presbyterian") is an Illinois not-for-profit corporation with its principal place of business in Chicago,

Illinois. Rush-Presbyterian sponsors medical residency programs, employing members of the Plaintiff Class. Rush-Presbyterian has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

39. Defendant St. Louis University, of which the St. Louis University School of Medicine is a part, is a Missouri not-for-profit corporation with its principal place of business in St. Louis, Missouri. St. Louis University, through the St. Louis University School of Medicine, sponsors medical residency programs, employing members of the Plaintiff Class. St. Louis University has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

40. Defendant Stanford Hospital and Clinics ("Stanford") is a California not-for-profit corporation with its principal place of business in Stanford, California. Stanford sponsors medical residency programs, employing members of the Plaintiff Class. Stanford has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this

Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

41. Defendant Strong Memorial Hospital of the University of Rochester ("Strong Memorial") is a New York not-for-profit corporation with its principal place of business in Rochester, New York. Strong Memorial sponsors residency programs, employing members of the Plaintiff Class. Strong Memorial has contracted, combined and conspired with the named Defendants and with other [sic] to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

42. Defendant Thomas Jefferson University Hospital, Inc. ("Thomas Jefferson Hospital") is a Pennsylvania not-for-profit corporation with its principal place of business in Philadelphia, Pennsylvania. Thomas Jefferson Hospital sponsors medical residency programs, employing members of the Plaintiff Class. Thomas Jefferson Hospital has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

43. Defendant University Hospitals of Cleveland, Inc. ("Cleveland University Hospitals") is an Ohio not-for-profit corporation with its principal place of business in Cleveland, Ohio. University Hospitals sponsors medical residency programs, employing members of the Plaintiff Class. University Hospitals has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

44. Defendant William Beaumont Hospital ("William Beaumont") is a Michigan not-for-profit corporation with its principal place of business in Royal Oak, Michigan. William Beaumont sponsors medical residency programs, employing members of the Plaintiff Class. William Beaumont has contracted, combined and conspired with the named Defendants and others to fix prices for resident wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

45. Defendant Yale-New Haven Hospital, Inc. ("Yale-New Haven") is a Connecticut not-for-profit corporation with its principal place of business in New Haven, Connecticut. Yale-New Haven sponsors medical residency programs, employing members of the Plaintiff Class. Yale-New Haven has contracted, combined and conspired with the named Defendants and others to fix prices for resident

wages as alleged in this Complaint. This Defendant participated in the conspiracy that was furthered by conspiratorial acts committed in the District of Columbia. Those conspiratorial acts were committed by, among others, Defendants MedStar-Georgetown, GWU, MedStar-Washington Hospital Center, and AAMC.

Organization Defendants

46. Defendant Accreditation Council for Graduate Medical Education ("ACGME") is an Illinois not-for-profit corporation maintaining a field representative in Washington, D.C. The ACGME accredits institutions ("Sponsoring Institutions") operating medical residency programs in one or more specialties, as well as the individual residency programs ("Sponsored Programs") affiliated with those and other institutions including, among others, 11 institutions and more than 100 residency programs located in Washington, D.C.

47. Defendant Association of American Medical Colleges ("AAMC") is an Illinois not-for-profit corporation maintaining its principal office in Washington, D.C. AAMC membership includes all 125 accredited medical schools (including those medical schools named as Defendants in this Complaint) and approximately 375 major teaching hospitals and health systems in the United States (including those hospitals and systems named as Defendants in this Complaint). These hospitals and health systems are Member Hospitals of AAMC's Council of Teaching Hospitals and Health Systems section ("COTH"). Certain COTH members are located in Washington, D.C. The AAMC is one of five governing sponsors of the ACGME.

48. Defendant American Medical Association ("AMA") is an Illinois not-for-profit corporation maintaining an office in Washington, D.C. AMA membership consists of physicians and others in the health care field. Numerous AMA members practice in Washington, D.C. The AMA is one of five governing sponsors of the ACGME.

PLAINTIFF CLASS ALLEGATIONS

49. Plaintiffs bring this suit on behalf of themselves and as a class action pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure on behalf of all persons employed as resident physicians in ACGME-accredited residency programs (including programs combined of ACGME-accredited programs) since May 7, 1998 ("Plaintiff Class"). ACGME-accredited residency programs include subspecialty programs commonly referred to as fellowships.

50. Plaintiffs estimate that the Plaintiff Class numbers more than 200,000 persons geographically dispersed throughout the United States, making joinder of all class members impracticable.

51. Questions of law and fact common to members of the Plaintiff Class include:

a. whether compensation and other terms of employment for resident physicians have been fixed, depressed, standardized and/or stabilized at levels below those which would prevail in a competitive market;

b. whether Defendants and others have fixed prices for resident wages by unlawfully exchanging competitively sensitive information, establishing and maintaining a "salary guideline" and "ethical rule" restricting wages, and/or establishing, agreeing to and complying with certain accreditation policies and procedures restricting wages;

c. the amount of damages suffered by Plaintiffs and members of the Plaintiff Class as a result of Defendants' illegal price-fixing; and

d. whether injunctive relief should issue to prohibit Defendants' illegal price-fixing.

52. The individual Plaintiffs' claims are typical of the claims of all members of the Plaintiff Class. The interests of the individual Plaintiffs are not antagonistic to the interests of other members of the Plaintiff Class, and the individual Plaintiffs will fairly and adequately protect the interests of members of the Plaintiff Class. Plaintiffs are represented by counsel experienced in the prosecution of antitrust class actions.

53. Defendants have acted, and refused to act, on grounds generally applicable to the Plaintiff Class, thereby making final injunctive relief appropriate as to the Plaintiff Class.

54. The questions of law and fact common to the members of the Plaintiff Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

55. A plaintiff class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Plaintiff Class is readily defined and prosecution of a plaintiff class action will eliminate the possibility of repetitious litigation, while also providing redress for claims which in some instances may be too

small to warrant the expense of individual complex litigation.

DEFENDANT CLASS ALLEGATIONS

56. Plaintiffs bring this suit against the named individual Defendants and as a class action pursuant to the provisions of Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure. The defendant class consists of: (a) all AAMC/COTH Member Hospitals as of the date of certification of the Defendant Class, and entities that were AAMC/COTH Member Hospitals at any time since May 7, 1998; and (b) all ACGME-accredited Sponsoring Institutions as of the date of certification of the Defendant Class, and entities that were ACGME-accredited Sponsoring Institutions at any time since May 7, 1998 ("Defendant Class"). The Defendant Class excludes all entities that are instrumentalities of federal, state or local government, including hospital districts and counties.

57. Plaintiffs estimate that the Defendant Class numbers more than 1,000 entities geographically dispersed throughout the United States, making joinder of all class members impracticable.

58. Questions of law and fact common to members of the Defendant Class include, as alleged in detail below:

a. whether compensation and other terms of employment for resident physicians have been fixed, depressed, standardized and/or stabilized at levels below those which would prevail in a competitive market;

b. whether Defendants and others have fixed prices on resident wages by unlawfully exchanging competitively sensitive information, establishing and maintaining a "salary guideline" and "ethical rule" restricting wages, and/or establishing, agreeing to and complying with certain accreditation policies and procedures restricting wages;

c. the amount of damages suffered by Plaintiffs and members of the Plaintiff Class as a result of Defendants' illegal price-fixing; and

d. whether injunctive relief should issue to prohibit Defendants' illegal price-fixing.

59. The individual Defendants' defenses are typical of the defenses of all members of the Defendant Class. The interests of the individual Defendants are not antagonistic to the interests of other members of the Defendant Class, and the individual Defendants will fairly and adequately protect the interests of members of the Defendant Class.

60. Defendants have acted, and refused to act, on grounds generally applicable to the Plaintiff Class, thereby making final injunctive relief appropriate against the Defendant Class.

61. The questions of law and fact common to the members of the Defendant Class predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

62. A defendant class action is superior to other available methods for the fair and efficient adjudication of this controversy. The Defendant Class is readily defined and prosecution of a defendant class action will eliminate the possibility of repetitious litigation.

INTERSTATE COMMERCE

63. Defendants' activities, including activities related to their illegal contract, combination and conspiracy to fix prices on the wages of resident physicians, are in the flow of, and substantially affect, interstate commerce.

64. Among other things, in connection with the exchange of competitively sensitive compensation information and ACGME accreditation, Defendants communicate with each other and/or their professional organizations and/or with prospective resident physician employees across state lines using interstate telecommunications networks, the internet, and the United States Mail. Defendants induce prospective resident physicians to cross state lines to interview for and accept employment positions and price-fixed wages. Defendants also obtain millions of dollars in payments and funding from out-of-state sources, purchase millions of dollars of goods and services from out-of-state sources, and provide millions of dollars in services to patients crossing state lines to receive such services.

RELEVANT MARKET AND DEFENDANTS' MARKET POWER

65. The relevant geographic market for purposes of Plaintiffs' claim is the United States.

66. The relevant product market for purposes of Plaintiffs' claim consists of the market for services of resident physicians in ACGME-accredited residency programs (including programs combined of ACGME-accredited programs and subspecialty programs commonly referred to as fellowships). Combined programs function as educational tracks within two or more ACGME-accredited

programs and qualify the resident for certification by more than one physician certification board holding membership in the American Board of Medical Specialties ("ABMS").

67. Specialty certification by one of the ABMS-member boards is essential to graduating medical school seniors and other eligible prospective residents. ABMS-member boards, with few exceptions, accept only ACGME-accredited residency employment in satisfaction of certification requirements.

68. Defendants' accreditation policies and procedures and information exchanges are each effectively coextensive with the defined market.

69. Defendants have and exercise market power within the relevant market. The vast majority of residents are employed by hospitals holding membership in AAMC/COTH, hospitals participating in the National GME Census, and/or hospitals that use the AAMC/COTH Survey and/or National GME Census to fix prices for resident wages. One hundred percent of residency positions in the relevant market are subject to the ACGME's accreditation policies and procedures, including those wage-restrictive policies and procedures challenged herein as price-fixing mechanisms.

70. The price-fixing mechanisms imposed on the relevant market by Defendants depress resident physician compensation below levels that would prevail in a competitive market and artificially slow the rate of compensation increases that would occur in a competitive market. Depressed salaries and a slowed rate of increase are indicia of Defendants' market power.

PRICE-FIXING THROUGH THE EXCHANGE OF RESIDENT COMPENSATION INFORMATION IN THE AAMC/COTH SURVEY

71. The Institution Defendants agree to and do fix prices for resident wages by regularly exchanging among themselves competitively sensitive information regarding resident compensation and other terms of employment through the AAMC/COTH Survey. Defendants AAMC and AMA agree to, participate in, assist and serve as conduits for this price-fixing activity by operating the AAMC/COTH Survey for the purpose, among other things, and effect of fixing prices for resident compensation. Defendant ACGME assists in this price-fixing through ongoing monitoring and enforcement of fixed wage levels through certain wage-restrictive accreditation policies and procedures as described herein.

72. Defendants' unlawful information exchange through the AAMC/COTH Survey has the purpose and effect of fixing, depressing, standardizing and stabilizing resident compensation and other terms of employment. Reporting compensation levels also serves to police the fixed prices and deter and reveal "cheating" by employers on the price-fixing agreement.

73. AAMC/COTH annually surveys members of the COTH Section. Historically, and continuing through at least 1998, the survey sought future pricing information; it was distributed each year in the Spring requesting anticipated compensation levels for the upcoming employment year to begin July 1. Sometime between 1998 and 2001, AAMC/COTH started distributing the surveys in July seeking compensation levels for the employment year beginning the first of that month. Based on the survey responses, AAMC/COTH publishes an annual report

entitled “Survey of Housestaff Stipends, Benefits and Funding,” which includes: (a) national average salaries for years one through six of post-graduate years of employment, including changes in dollar amounts and percentages for each since the prior year; (b) national average salaries for first-year residents from 1968 though the present, including for each year the dollar amount, dollar amount adjusted for inflation, and change in dollars and percentages from the prior year; (c) changes, in dollar amounts and percentages, since the prior year in four regional average salaries for years one through six of post-graduate years of employment; (d) national and regional average salaries for years one through six of post-graduate years of employment, by ownership type (state, municipal, church, other not-for-profit, Veterans Affairs, and medical school); and (e) detailed benefits such as health insurance, vision benefits, and prescription drug benefits.

74. Approximately 75% of all residents are employed by AAMC/COTH members surveyed in connection with the resident compensation information exchange and the resulting report is available to all employers in the relevant market. Moreover, as alleged more fully below, current employer-specific salary information is accessible through an electronic database to the Defendants and members of the Defendant Class. This database contains information obtained through the AMA/AAMC National GME Census, another information exchange operated and participated in by Defendants.

75. Information included in the AAMC/COTH Survey reports is highly specific. Once salary information is broken down into subsets based on year of employment, region, and ownership type, those subsets consist of as few as five employers.

76. AAMC/COTH Survey reports also include budget information, including resident compensation as a percentage of total operating budget, ratio of resident benefits to salaries, and funding sources for resident salaries.

77. Full AAMC/COTH Survey reports are distributed in October or November, with a "preliminary report" containing only salary information issued sometime before that.

78. The annual AAMC/COTH Survey data provide employers with a baseline for determining resident physician compensation for the upcoming year. The following year employers are provided with another survey report which establishes a new baseline. In this way, employers avoid straying from fixed, depressed, standardized and stabilized compensation levels.

79. In addition to the AAMC/COTH Survey reports, employers have access to resident physician compensation information through an electronic database known as the Fellowship and Residency Electronic Interactive Database ("FREIDA"), which is maintained by the AMA and derived from the AMA/AAMC National GME Census described more fully below. The information contained in FREIDA is not average or aggregated data. It is detailed and employer-specific.

80. The illegal purpose of the AAMC/COTH Surveys and reports to fix, depress, standardize and stabilize resident physician compensation is revealed by the following historical features:

a. survey reports for several years included a "regression analysis worksheet" allowing employers to calculate the average salaries paid in their particular circumstances, arrived at by using the Northeast region average as a base and adding or subtracting specific dollar amounts for the particular region in which the recipient is located and its type of hospital ownership;

b. survey reports have at times included statistics on "atypical" deviations from salary averages, a statistic having no apparent purpose or effect other than furthering standardization and policing the price-fix; and

c. shortly after the survey was instituted, employers were asked whether they favored establishing a "uniform schedule" for resident salaries with adjustments for regional cost of living differences – a suggestion for unconcealed price-fixing. It was endorsed by approximately 70% of the subsequent respondents.

81. Residency positions within the relevant market are sufficiently comparable across employers to allow Defendants to use effectively the exchanged information as part of a conspiracy to fix prices and restrain competition.

82. Defendant AAMC, which acts as a trade association, and the Institution Defendants agree to and do fix, depress, standardize and stabilize resident compensation and other terms of employment through the AAMC/COTH Survey.

PRICE-FIXING THROUGH THE EXCHANGE OF RESIDENT COMPENSATION INFORMATION IN THE AMA/AAMC NATIONAL GRADUATE MEDICAL EDUCATION CENSUS

83. The Institution Defendants agree to and do fix prices for resident wages by regularly exchanging among

themselves competitively sensitive information regarding resident compensation and other terms of employment through the AMA/AAMC National Graduate Medical Education Census ("National GME Census" or "AMA/AAMC Census"). Defendants AAMC and AMA agree to, participate in, assist and serve as conduits for this price-fixing activity by operating the AMA/AAMC Census for the purpose, among other things, and with the effect of fixing prices for resident compensation. Defendant ACGME agrees to, participates in and assists in this price-fixing through ongoing monitoring and enforcement of fixed wage levels through certain wage-restrictive accreditation policies and procedures as described herein.

84. Defendants' unlawful information exchange through the AMA/AAMC Census has the purpose and effect of fixing, depressing, standardizing and stabilizing resident compensation and other terms of employment. Reporting compensation levels also serves to police the fixed prices and deter and reveal "cheating" by employers on the price-fixing agreement.

85. Defendants AMA and AAMC created and now operate the National GME Census, which provides an information-exchange mechanism by which resident compensation levels are fixed and remain stabilized and depressed. More specifically, Defendants AMA and AAMC jointly conduct, with assistance from Defendant ACGME, an annual survey of residency programs that (1) collects *future* resident wage information; (2) collects wage information that is not subsequently made available to residents through the FREIDA database; and (3) provides suppressed and fixed wage levels to employers by providing them with Census *survey* forms having wage information already filled out.

86. The AMA/AAMC Census is a survey of approximately 8,000 residency programs that collects new information and confirms existing information on those programs and on the 100,000 individual residents they employ. The Census is jointly conducted by Defendants AMA and AAMC, using residency program contact and other information supplied by Defendant ACGME. Prior to March 2000 when these surveys were combined, AMA and AAMC conducted separate surveys. By combining their previously separate surveys, Defendants AAMC and AMA consciously enhanced Defendants' price-fixing scheme by strengthening their ability to monitor compliance with fixed wage levels.

87. The AMA/AAMC Census consists of two components, a Program Survey and a Resident Survey, both directed to and answered by residency programs. Each survey is conducted annually, but employers may update the information regarding their programs and residents at any time. The Census Program Survey collects or confirms information on residency program characteristics, including the wages paid and vacation time and sick leave for residents in each PGY year of employment. Some, but not all, of this information is subsequently made publicly available through the AMA's FREIDA database. The Census Program Survey form allows programs to instruct AMA and AAMC *not* to include the surveyed information in the FREIDA database and thus to prevent the disclosure of wage information to the public (including residents and potential residents).

88. The AMA/AAMC Census Resident Survey collects or confirms personal information regarding each individual resident employed by the surveyed residency program, including current status, residency start date,

expected completion date, number of years of prior residency employment, medical school, gender, ethnicity, social security number and contact information. This information is subsequently maintained in AMA's Physician Masterfiles. The AMA establishes individual records at the beginning of medical school for all students enrolled in the United States and establishes records at the beginning of residency employment for all others.

89. The AMA/AAMC Census is conducted primarily online through "GME Track", an interactive website accessible only to participants like Defendants, although hardcopy survey forms are also distributed among employers and collected by Defendants AMA and/or AAMC. The results of the Census are incorporated into the GME Track database, which also contains information on programs and residents obtained from other sources, including Defendant ACGME (which provides program accreditation information).

90. The AMA/AAMC Census has a high response rate and provides AMA and other Defendants with a highly reliable and almost entirely complete collection of data on surveyed issues regarding residents and employers, including wage information. The Census Program Survey allows Defendants, with the active involvement of AMA, AAMC and ACGME, to police suppressed, standardized and fixed wage levels.

91. Beyond its use as a wage policing device, the AMA/AAMC Census Program Survey is used by AMA and AAMC to telegraph fixed, depressed, standardized and stabilized wage levels to employers. The Census Program Survey form does not simply request wage information in blank fields. Instead, it contains wage fields "pre-filled"

with specific wage numbers. The source of the pre-filled wage numbers is unclear, but the purpose and effect is to fix, depress, standardize and stabilize resident wages.

92. Additionally, for several years the AMA/AAMC Census Program Survey collected *future* wage information rather than current information. The Census survey forms are issued in June or July of each year and returned by employers each autumn. The 1997 survey expressly sought wage levels for the employment year to begin in July 1998; the 1998 fall survey expressly sought wage levels for the employment year to begin in July 1999; the 1999 fall survey gave employers the option of reporting existing wage levels or those for the year to begin in July 2000; and the 2000 fall survey gave the option of reporting existing wage levels or those for the year to begin in July 2001. The 2001 and 2002 surveys do not specify whether the information requested is current or future data.

93. Defendants AAMC and AMA, which act as trade associations, and the Institution Defendants agree to and do fix, depress, standardize and stabilize resident compensation and other terms of employment through the AMA/AAMC National GME Census.

PRICE-FIXING THROUGH AN AMA "SALARY GUIDELINE" AND ETHICAL STANDARD

94. The Institution Defendants agree to and do fix prices for resident wages by complying with an AMA "salary guideline" and "ethical rule" restricting resident compensation. Defendant AMA agrees to, participates in, assists and serves as the conduit for this price-fixing activity by maintaining and enforcing the restrictive guideline and rule for the sole purpose and effect of fixing

prices for resident compensation. Defendants AAMC and ACGME agree to, participate in and assist in this price-fixing through ongoing monitoring and enforcement of fixed wage levels through the AAMC/COTH Survey, the AMA/AAMC Census, and certain wage-restrictive accreditation policies and procedures as described herein.

95. Defendants' activities relating to the AMA's restrictive guideline and rule have the purpose and effect of fixing, depressing, standardizing and stabilizing resident compensation and other terms of employment.

96. AMA maintains a "guideline" recommending that each employer pay all residents within the institution the same salary regardless of specialty, which furthers Defendants' objective of fixed, depressed, standardized and stabilized resident wages. Specifically, AMA publishes "Guidelines for Resident Agreements or Contracts" for use by employers in preparing their employment contracts with residents. The AMA's guideline regarding "Salaries" states in pertinent part:

> "While residents at the same level in different programs in the institution should, to the extent possible, be paid the same salary, a differential can be paid for senior residents. (Note: court decisions may in the near future establish that ACGME cannot require that all residents at the same level be paid the same amount.)"

97. Moreover, AMA maintains an "ethical rule" restraining resident bonuses. AMA's Current Opinion on Professional Rights and Responsibilities of the Council on Ethical and Judicial Affairs (CEJA) E-0.037 "Signing Bonuses to Attract Graduates of U.S. Medical Schools" states in full:

> "Signing bonuses or compensation should not be offered or denied to a resident based on the country where the resident attended or graduated from medical school. (III, IV, IV) Issued June 2000 based on the report, 'Signing Bonuses to Attract Graduates of U.S. Medical School,' adopted December 1999."

Signing bonuses to residents were historically very infrequent and modest, and CEJA E-0.037 is a largely prophylactic measure having the purpose and effect of maintaining fixed, depressed, standardized and stabilized wage levels. Additionally, prohibiting bonuses to U.S. medical school graduates has the purpose and effect of prohibiting bonuses to all applicants since any signing bonuses had historically been paid only to attract U.S. graduates.

98. The ethical standards adopted by AMA's CEJA establish widely accepted principles of "medical ethics". Violations of AMA CEJA standards may result in disciplinary action by local physician organizations. For example, The Medical Society of the District of Columbia maintains a Professional Standards Committee that investigates and reviews complaints against physicians practicing in the community, including specifically "the conduct of physicians in relation to the *Opinions of the Judicial Council of the American Medical Association* [which] contains the accepted standards of medical ethics for the profession." Violations of CEJA ethical standards may also result in disciplinary action by local physician licensing authorities. For example, District of Columbia Municipal Medicine Regulation 4612.8 adopts "the prevailing standards of acceptable medical practice."

99. Residency program directors and employers generally comply with the AMA "guideline" and "ethical rule" restraining resident compensation, substantially furthering Defendants' scheme to fix depress, standardize and stabilize wages for residents. Consistent with AMA's Salary Guideline for Resident Agreements or Contracts, employers generally pay the same wages to all of their residents regardless of specialty. Consistent with AMA's ethical standard CEJA E-0.037, employers generally do not pay signing bonuses to attract graduates of U.S. medical schools or any other applicants.

100. For example, Defendant Emory states that "stipend amounts are based on post graduate year level, [and] are identical for all programs . . . ". Indeed, the 1997-98 AAMC/COTH Survey report states that "in 1997-98 the majority of hospitals (89.0) percent) reported that they pay the same base stipends to housestaff across all specialties."

101. Defendant AMA, which acts as a trade association, and the Institution Defendants agree to and do fix, depress, standardize and stabilize resident compensation and other terms of employment through the AMA's wage-restrictive "salary guideline" and "ethical rule."

PRICE-FIXING THROUGH WAGE-RESTRICTIVE ACGME ACCREDITATION POLICIES AND PROCEDURES

102. The Institution Defendants agree to and do fix prices for resident wages by collectively creating price-fixing accreditation policies and procedures and voluntarily agreeing to and complying with those policies and procedures. Defendant ACGME agrees to, participates in,

assists and serves as the conduit for this price-fixing activity by designing, maintaining and enforcing these wage-restrictive policies and procedures for the purpose and effect of fixing prices for resident compensation. Defendants AAMC and AMA agree to, participate in and assist in this price-fixing through ongoing monitoring and enforcement of fixed wage levels through the AAMC/COTH Survey and AMA/AAMC Census.

103. Defendants' activities relating to the wage-restrictive ACGME accreditation policies and procedures have the purpose and effect of fixing, depressing, standardizing and stabilizing resident compensation and other terms of employment. The ACGME has significant influence on employers since accreditation is, for all practical purposes, necessary to attract resident physician employees. With few exceptions, only resident physicians who complete specified employment periods in ACGME-accredited institutions and programs or combined programs are eligible for ABMS-member board certification. Without accreditation, an employer could not provide a resident with the credentials necessary for certification and would be unable to accurately describe the employment as residency.

104. An article published in the March 1997 edition of the American College of Physicians *Observer* demonstrates that Defendant ACGME is deeply involved in the fixing, depression, standardization, and stabilization of resident wages. The article discusses the upcoming rescission of an ACGME standard which, like the AMA's "salary guideline," required that employers pay residents identical wages regardless of specialty. According to the article, rescission of the rule "was spurred by federal antitrust concerns over the way that training programs set resident

stipends." An official of the AAMC with responsibility for the COTH Survey is quoted as saying that rescission of the rule "could open the door to differentials in a way that we haven't seen before," but the executive secretary of the ACGME "expressed doubt that the new rule will prompt immediate changes" because "there are lots of reasons for keeping stipends fairly much the same." Clearly identifying the ACGME's role in setting wages, the article notes that some employers had discussed offering higher stipends or signing bonuses to attract residents, or "in other ways skirt[ing] ACGME's guidelines on housestaff pay."

105. Further confirmation of price-fixing of resident wages by Defendant ACGME is revealed by its role with respect to fellowship wages paid by the National Cancer Institute and National Institute of Mental Health in 2003. According to a document obtained from the NIH Human Resources department, "the Accreditation Council for Graduate Medical Education (ACGME) has informed NIH that a standardized pay scale will be required for future accreditation . . . " The document further reflects the institutes' plans to comply by adopting new wage levels.

106. The ACGME wage-restrictive policies and procedures illegally fix, depress, standardize and stabilize resident compensation and other terms of employment in at least two ways. First, through its policies and procedures the ACGME establishes a subsistence level wage ceiling. Second, through its policies and procedures the ACGME participates in setting, monitoring and enforcing price-fixed wages.

Price-Fixing Through ACGME Policies Establishing A Subsistence Level Wage Ceiling

107. ACGME Institutional Requirement ("IR") III.B. states that "[s]ponsoring and participating institutions should provide all residents with *appropriate* financial support and benefits to ensure that residents are able to fulfill the responsibilities of their educational programs." (Emphasis added).

108. ACGME IR IV.B.2. states that resident wages must be "reasonable and fair." The ACGME requires each Sponsoring Institution to maintain a Graduate Medical Education Committee ("GMEC"), and IR IV.B.2. states that "[t]he GMEC must review annually and make recommendations to the Sponsoring Institution on resident stipends, benefits and funding for resident positions to assure that these are *reasonable and fair*." (Emphasis added).

109. By mandating "appropriate," "reasonable" and "fair" wages, the ACGME establishes an express or implied ceiling on resident wages. Based on wages paid by the Institution Defendants and members of the Defendant Class which maintain accreditation, annual salaries in a narrow range around $40,000 are judged "appropriate", "reasonable" and "fair" by the ACGME, while higher wages are not. Consistent with IR III.B., salaries in the $40,000 range "ensure that residents are able to fulfill the responsibilities of their educational programs," but allow no higher standard of living.

110. Even if the ACGME were attempting to establish a floor wage rather than a ceiling – which it is not – any wage floor quickly and effectively becomes a ceiling. In its accreditation reviews, the ACGME discloses the lowest

range of wages that will satisfy its accreditation requirements. The Institution Defendants, and members of the Defendant Class, use this range as a baseline and set wages at approximately that amount and no more. Regardless of the ACGME's purpose, IR III.B. establishes a wage ceiling.

111. Employers, including the Institution Defendants, agree to and comply with the wage ceiling imposed by ACGME's Institutional Requirements and risk loss of their accreditation if they do not. IR III.B. states that employers "should" pay "appropriate" wages. The ACGME defines "should" as "a term used to designate requirements that are so important that their absences must be justified. The accreditation status of a program or institution is at risk if it is not in compliance with a 'should.'"

112. Defendant ACGME, which acts as a trade association, and the Institution Defendants agree to and do fix, depress, standardize and stabilize resident compensation and other terms of employment through establishing a subsistence level wage ceiling through IR III.B. and IR IV.B.2.

Price-Fixing Through ACGME Participation In Determining And Monitoring Wages

113. ACGME Institutional Requirement IV.A. obligates each Sponsoring Institution to establish and maintain a Graduate Medical Education Committee ("GMEC") "that has the responsibility for monitoring and advising on all aspects of residency education" for residency programs at the institution. The GMEC "must [include] a Designated Institutional Official (DIO) who has the authority and responsibility for the oversight and administration of the

Sponsoring Institution's ACGME-accredited programs and who is responsible for assuring compliance with ACGME Institutional Requirements."

114. As noted above, ACGME Institutional Requirement IV.B.2. states that "the GMEC *must* review annually and make recommendations to the Sponsoring Institution on resident stipends, benefits and funding for resident positions to assure that these are reasonable and fair."

115. From at least September 2000 through July 2003, ACGME Institutional Requirement III.B. required that "[c]ompensation of residents . . . should be carried out with the advice of the GMEC."

116. By maintaining a committee that is obligated to comply with ACGME policies and procedures, including the wage-restrictive policies and procedures, while at the same time authorizing that committee to participate in setting and monitoring wages, the Institutional Defendants further their conspiracy to fix, depress, standardize and stabilize resident wages. Defendant ACGME agrees to, participates in, assists and serves as the conduit for this price-fixing activity by maintaining and enforcing the relevant wage-restrictive policies and procedures.

117. In the Graduate Medical Education Directory for 1996, published by the AMA, the ACGME's Institutional Requirements included the requirement (similar to the AMA "salary guideline"), that "[a]ll residents at similar levels of experience and training in all of an institution's programs should receive a comparable level of financial support. Exceptions must be justified to the institution's Graduate Medical Education Committee."

118. Defendants AMA and AAMC help "police" and deter violations of the price-fixing ACGME policies and procedures. As alleged above, the AMA/AAMC Census survey results are contained in GME Track which combines Census results with information that AMA and AAMC collect from Defendants ACGME. When coupled with ACGME information, the Census enables and is used to identify employers whose wages do not comply with the fixed, depressed, standardized and stabilized wage levels and warrant a more direct review of compensation by ACGME as the accrediting authority.

119. Defendant ACGME, which acts as a trade association, and the Institution Defendants agree to and do fix, depress, standardize and stabilize resident compensation and other terms of employment through the ACGME's participation in determining and monitoring wages pursuant to IR IV.A. and IR IV.B.2.

INSTITUTION DEFENDANTS' STANDARDIZED WAGES AND LOCAL AFFILIATIONS FACILITATING DEFENDANTS' NATIONAL PRICE-FIXING SCHEME

120. Each of the twenty-seven Institutional Defendants affiliates with other local employers of residents, and/or a local medical school, in a way that facilitates communications among the Institutional Defendant and other employers regarding resident wages. Defendants use such affiliations to promote the national price-fixing schemes alleged in this complaint, and to coordinate wage levels and to pay substantially similar wages to residents in their separate residency programs. Specifically:

a. Defendant Emory maintains a Graduate Medical Education Advisory Committee consisting of representatives from several affiliated resident employers. The minutes of a meeting held by this committee on April 21, 1999, note "a lengthy discussion regarding stipends" and "particular frustration [] over one institution who provides the 'low bid' for stipends. Because of the action of this one hospital, all hospitals are held to paying the same stipends" The committee awaited "further discussion among the [Emory-affiliated hospitals] CEOs regarding an increase in stipends for the upcoming year." The Emory-affiliated hospitals apparently pay all first-year Internal Medicine residents $38,920.[b] In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all five employers in the State of Georgia whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $37,000 and $38,920;

b. Defendant MedStar-Georgetown affiliates with, among others, Defendant MedStar-Washington Hospital Center and Defendant GWU, directly and/or through Georgetown University School of Medicine and GWU School of Medicine. Georgetown University Hospital pays first-year Internal Medicine residents $38,178; Washington Hospital Center pays such residents $40,000; and GWU Hospital pays such residents $38,774. In this and all other specialties, these Defendants and employers in these Defendants' area pay wages consistent with national price-fixed levels. For example, all four employers in the District of Columbia whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $35,443 and $40,000;

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[b] All wage figures cited herein are current as of August 2004 based on the AMA FREIDA database and/or relevant websites.

c. Defendant Tulane affiliates with, among others, Tulane University Hospital and the Ochsner Clinic Foundation. Tulane University Hospital pays first-year OBGYN residents $36,413, and the Ochsner Clinic pays such residents $39,040. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all three employers in the State of Louisiana whose first-year Pediatrics wages are reported in the AMA FREIDA database pay residents exactly the same wage of $36,413;

d. Defendant Barnes-Jewish Hospital affiliates with, among others, and maintains a consortium with St. Louis Children's Hospital and Washington University School of Medicine. All first-year Internal Medicine residents within this consortium are paid $38,256. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all eight employers in the State of Missouri whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $37,000 and $39,800;

e. Defendant Baylor College of Medicine affiliates with eleven Houston-area hospitals. All first-year OBGYN residents at these hospitals are apparently paid $39,559. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all seventeen employers in the State of Texas whose first-year

OBGYN wages are reported in the AMA FREIDA database pay residents between $35,530 and $39,559;

f. Defendant Beth Israel Deaconess affiliates with, among others, the Lahey Clinic, directly and/or through Harvard Medical School. Beth Israel Deaconess pays first-year Internal Medicine residents $41,746, and the Lahey Clinic pays such residents $41,954. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all fourteen employers in the State of Massachusetts, including both those within the Boston metropolitan area and those outside, whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $36,715 and $45,000;

g. Defendant Beth Israel affiliates with, among others, Jacobi Medical Center and Montefiore Medical Center, directly and/or through Albert Einstein College of Medicine of Yeshiva University. Beth Israel pays first-year Emergency Medicine residents $46,020, and both Jacobi and Montefiore pay such residents $46,292. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all six employers in the City of New York whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $44,454 and $48,481, and all four such employers in Brooklyn, New York pay residents between $43,445 and $50,014;

h. Defendant Boston Medical Center affiliates with, among others, Tufts New England Medical Center, directly and/or through the Boston University School of

Medicine. Boston Medical Center pays first-year OBGYN residents $42,002, and Tufts pays such residents $40,792. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all fourteen employers in the State of Massachusetts, including both those within the Boston metropolitan area and those outside, whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $36,715 and $45,000;

i. Defendant Cedars-Sinai affiliates with, among others, the UCLA Medical Center, directly and/or through the David Geffen School of Medicine at UCLA. Cedars-Sinai pays first-year Internal Medicine residents $37,507, and UCLA Medical Center pays such residents $38,100. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all twenty employers in the State of California, including both those within the metropolitan areas of Los Angeles and San Francisco and those outside, whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $35,672 and $43,260;

j. Defendant Cleveland Clinic affiliates with, among others, Defendant Cleveland University Hospitals, directly or through Case Western Reserve University School of Medicine. Cleveland Clinic pays first-year Psychiatry residents $38,002, and Cleveland University Hospitals pays such residents $37,000. In this and all other specialties, these Defendants and employers in these Defendants' area pay wages consistent with national price-fixed levels. For example, all sixteen employers in the State of Ohio whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $37,000 and $42,500;

k. Defendant Duke affiliates with, among others, the University of North Carolina Hospitals, directly and/or through the Duke University School of Medicine. Duke pays first-year Emergency Medicine residents $39,960, and UNC Hospitals pay such residents $39,500. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all five employers in the State of North Carolina whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $38,000 and $41,527;

l. Defendant Henry Ford affiliates with, among others, Defendant William Beaumont, directly and/or through Wayne State University School of Medicine. Henry Ford pays first-year Internal Medicine Residents $39,811, and William Beaumont pays such residents $41,900. In this and all other specialties, these Defendants and employers in these Defendants' area pay wages consistent with national price-fixed levels. For example, all twelve employers in the State of Michigan whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $36,791 and $41,900;

m. Defendant Massachusetts General affiliates with, among others, Brigham & Women's Hospital, directly and/or through Harvard Medical School (which also affiliates with Defendant Beth Israel Deaconess). Massachusetts General pays first-year Psychiatry residents $45,000, and Brigham & Women's also pays such residents $45,000. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all fourteen employers in the State of Massachusetts, including both those within the Boston metropolitan area and those outside, whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $36,715 and $45,000;

n. Defendant McGaw affiliates with, among others, Mount Sinai Hospital Medical Center of Chicago, directly and/or through Northwestern University Feinberg School of Medicine. McGaw pays first-year OBGYN residents $39,423, and Mt. Sinai pays such residents $38,640. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all seventeen employers in the State of Illinois, including both those within the Chicago metropolitan area and those outside, whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $37,000 and $43,000;

o. Defendant Mount Sinai affiliates with, among others, Elmhurst Hospital and Queens Hospital Center, directly and/or through the Mount Sinai School of Medicine of New York University. Mount Sinai Medical Center pays first-year Emergency Medicine residents $44,726, and Elmhurst Hospital and Queens Hospital each pay first-year Internal Medicine residents exactly the same wage of $42,427. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all six employers in the City of New York whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $44,454 and $48,481, and all four such employers in Brooklyn, New York pay residents between $43,445 and $50,014;

p. Defendant New York Presbyterian affiliates with, among others, the New York Hospital Medical Center of Queens, directly or through the Weill Medical College of Cornell University. New York Presbyterian pays first-year Emergency Medicine residents $45,234, and Queens pays such residents $44,273. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all six employers in the City of New York whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $44,454 and $48,481, and all four such employers in Brooklyn, New York pay residents between $43,445 and $50,014;

q. Defendant Rhode Island Hospital affiliates with, among others, the Memorial Hospital of Rhode Island-Pawtucket, directly or through Brown University Medical School. Rhode Island Hospital pays first-year Internal Medicine residents $42,479, and Memorial Hospital pays such residents $41,579. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all three employers in the State of Rhode Island whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $40,712 and $42,479;

r. Defendant Rush-Presbyterian affiliates with, among others, West Suburban Medical Center, directly or through the Rush Medical College of Rush University. Rush-Presbyterian pays first-year Internal Medicine residents $40,593, and West Suburban pays such residents $40,125. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all seventeen employers in the State of Illinois, including both those within the Chicago metropolitan area and those outside, whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $37,000 and $43,000;

s. Defendant St. Louis University affiliates with, among others, St. Mary's Hospital Center, directly and/or through the St. Louis University School of Medicine. St. Louis University Hospital pays first-year Internal Medicine residents $37,908, and St. Mary's pays such residents $38,790. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all eight employers in the State of Missouri whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $37,000 and $39,800;

t. Defendant Stanford affiliates with, among others, the Alameda County Medical Center, directly and/or through the Stanford University School of Medicine and University of California-San Francisco School of Medicine. Stanford Hospital pays first-year Internal Medicine residents $35,672, and Alameda pays such residents $37,401. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all twenty employers in the State of California, including both those within the metropolitan areas of Los Angeles and San Francisco and those outside, whose first-year Internal Medicine wages are reported in the AMA

FREIDA database pay residents between $35,672 and $43,260;

u. Defendant Strong Memorial affiliates with, among others, Rochester General Hospital, directly and/or through the University of Rochester School of Medicine. Strong Memorial pays first-year Internal Medicine residents $40,153, and Rochester General pays such residents $39,288. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all three employers in Rochester, New York whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $39,288 and $41,339;

v. Defendant Thomas Jefferson affiliates with, among others, Lankenau Hospital, directly and/or through the Thomas Jefferson Medical College of Thomas Jefferson University. Thomas Jefferson University Hospital pays first-year Internal Medicine residents $40,000, and Lankenau pays such residents $40,994. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all twenty-six employers in the State of Pennsylvania whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $37,585 and $43,830;

w. Defendant Yale-New Haven affiliates with, among others, Bridgeport Hospital, directly and/or through the Yale University School of Medicine. Yale-New Haven pays first-year Internal Medicine residents $44,600, and Bridgeport pays such residents $44,992. Employers in this Defendant's area pay wages consistent with national price-fixed levels. In this and all other specialties, this Defendant and employers in this Defendant's area pay wages consistent with national price-fixed levels. For example, all ten employers in the State of Connecticut whose first-year Internal Medicine wages are reported in the AMA FREIDA database pay residents between $41,000 and $47,390;

121. All of these local affiliations among the Institutional Defendants, and similar affiliations among members of the Defendant class, facilitate wage-related communications and price-fixing, and are used, among other things, for that purpose and to that effect.

122. Wages paid to residents by the Institution Defendants, as set forth above, reflect fixed depressed, standardized and stabilized prices for resident wages. Slight variations from national averages are tolerated for large metropolitan areas such as Boston and New York in light of their higher costs of living, but wages are nonetheless fixed, depressed, standardized and stabilized within theses areas. The wages paid by the Institution Defendants and members of the Defendant Class to medical residents would be higher in the absence of Defendants' price-fixing mechanisms.

ECONOMIC EVIDENCE OF DEFENDANTS' PRICE-FIXING AND ITS EFFECTS ON RESIDENT COMPENSATION AND WORKING CONDITIONS

123. Defendants' contract, combination and conspiracy to fix, depress, standardize and stabilize wages has had that intended effect, and pursuant to that contract, combination and conspiracy wages paid to residents by the Institution Defendants and the Defendant Class members is demonstrably fixed, depressed, standardized and stable.

Resident Wages Are Artificially Depressed

124. The wages paid to residents by the Institution Defendants and members of the Defendant Class are depressed and artificially low. Despite their advanced education, long work hours, and valuable patient care services, first-year residents earned an average salary of about $35,700 during the 2000-2001 employment year, amounting to about $10 per hour. Residents in their second and later years of employment were paid only slightly more, with lock-step increases based on the year of employment.

125. Residents generally earn less, on both an annualized and hourly basis, than other hospital employees such as nurse practitioners and physician assistants. The hourly compensation paid resident physicians in their residency positions is substantially lower than the pay that those same physicians can (and often do) earn by providing services to a hospital during off-duty hours ("moonlighting"), although many employers do not allow "moonlighting" by resident physicians. Residents may earn $50, $75 or more hourly while moonlighting, much more than the estimated $10 hourly wage they earn in their formal residency positions.

126. Residents' relatively low hourly wages are exacerbated by the dangerously long work hours which are demanded of them. The Institution Defendants, members of the Defendant Class and their affiliates have inflated and standardized work hours to unsafe levels, exploiting resident physicians by routinely requiring 60 to 100 weekly work hours or more, often including 36-hour and 48-hour shifts.

127. Excessive work hours are dangerous to residents. Studies show that sleep deprivation affects people in a way similar to alcohol consumption, with 24 hours awake having effects indistinguishable to a "legally drunk" 0.10 blood alcohol content. Residents driving home after long work shifts are prone to traffic accidents resulting in injury and death to themselves and others. For example, during the 1990s at least three residents died in post-duty traffic accidents in New York City alone.

128. Excessive work hours are also dangerous to patients. Long hours lead to resident exhaustion and fatigue-related medical errors that injure and kill patients. In a 1999 study, the Institute of Medicine of the National Academies concluded that medical errors in the United States kill up to 98,000 patients annually and injure one million more. Many have drawn the common sense correlation between fatigued residents and, in the words of the Institute's chair, the "stunningly high" incidence of avoidable errors, as noted in a Washington Post editorial on December 9, 2002.

129. The problem of resident fatigue resulting from long work hours demanded by employers is compounded by the fixed and depressed wages paid by employers. Many residents have no choice but to "moonlight" for additional income, increasing even further their exhausting number of work hours. As stated by Defendant ACGME itself, "resident stipends are often not sufficient to cover the cost of living and loan repayments. Thus, residents may seek opportunities to earn additional money during residency to assist in educational loan repayments." This statement undermines any contention by the ACGME that its wage-restrictive policies and procedures

are intended only to create a wage floor rather than a wage ceiling.

130. Demonstrating that resident wages are fixed and depressed is a simple comparison between low wages and high revenues generated by residents' work. While employers and their trade associations, such as Defendant AAMC, tend to jealously guard the relevant information, a variety of sources suggest that each resident generates, on average, in the neighborhood of $200,000 or more annually for his or her employer.

131. Employers receive funding from Medicare, among other sources. Total Medicare funding for residency programs in 1998 was $6 billion, or about $60,000 for each of the approximately 100,000 residents in the United States. By one estimate, total Medicaid funding through States added another $2.3 billion, or roughly $23,000 per resident. Many current estimates put government funding alone at approximately $100,000 per resident or more. Medicare and Medicaid funding takes the form of per capita funding for each resident employed, along with a premium for services provided to Medicare and Medicaid patients.

132. Demonstrating that resident wages are fixed and standardized is the additional fact that Medicare funding, calculated on a per resident basis, varies much more widely among employers than do the wages that those employers pay residents. Thus, standardized wages cannot be explained by standardized Medicare funding because the latter is *not* standardized. Indeed, Medicare funding has historically been so varied that the Balanced Budget Refinement Act of 1999 created a floor and ceiling for per resident Medicare funding: a floor of 70% of the

national average per resident payment and a ceiling of 140%.

133. The government, however, is not the only source of revenue generated for hospitals as a result of residents' work. Indeed, one study estimates that government funding constitutes only one-half of all resident-generated revenues. As stated in one study in the Journal of the AMA, "[m]any private payers implicitly support teaching hospital missions with rates higher than what they pay community hospitals" and "[h]ospital and faculty physician billings for services provided by residents are another source of revenue for some [teaching hospitals]." In an April 2000 presentation, ECG Management Consultants listed other revenue streams flowing from employing residents to include gifts, grants, contracts, and third-party payments.

134. Indeed, in some instances the non-governmental revenue generated by residents for an employer is so high that the employer chooses not to participate in Medicare and/or Medicaid funding programs because it is more profitable to have residents provide services outside those programs.

135. The fact that resident wages are fixed and depressed is also demonstrated by a simple comparison between the costs associated with residents and the much higher costs of replacing them with other qualified personnel to provide the same services. According to the Health Resources and Services Administration (part of the U.S. Department of Health and Human Services):

> "While residents represent a cost to teaching hospitals and their affiliated clinics, the health services that more experienced residents render

help defray other costs than an institution would likely incur if they were not present. For example, a second or third year resident may work 80 hours a week at an annual salary of about $40,000. If that position did not exist, the service duties would often be performed by a higher paid, fully certified physician(s), or, at a minimum, a nurse practitioner or physician assistant. In either case, the hospital would bear a replacement cost in excess of employing the resident."

136. Several studies verify that the costs associated with residents are much lower than the costs of replacing them. For example, a study reported in the January 1999 edition of Anesthesiology concluded that for the University of Texas-Houston Department of Anesthesiology, the average net cost of replacing a resident would be about $30,000 annually. Another study reported in the August 1998 edition of Anesthesiology and Analgesia concluded that, on average, replacing an anesthesiology resident with a nurse anesthetist, nurse practitioner and/or physician's assistant would result in a net cost to Defendant Duke about $50,000 annually. Some estimates of replacement costs are even higher.

137. According to an American Hospital Association official quoted in a July 10, 2003 *Chicago Tribune* news article, reducing resident work hours to comply with the ACGME 80-hour workweek guideline adopted in June 2002 would cost the average employer an amount "in the millions." The ACGME guidelines were hastily adopted after these Plaintiffs' original action was filed on May 7, 2002, and industry sources like the American Academy of Family Physicians have credited this lawsuit with precipitating adoption of the new guidelines.

Resident Wages Are Standardized

138. The wages paid to residents by the Institution Defendants and members of the Defendant Class are standardized. Employers all across the United States generally pay residents about the same wage, regardless of such factors as program prestige, medical specialty, geographic location, resident merit and year of employment. With few exceptions, employers pay salaries very close to the national average and very close to one another. By contrast, post-residency physicians earn widely varying compensation based on these factors, especially geographic location and medical specialty.

139. Standardization of resident wages by the Institution Defendants specifically, and members of the Defendant Class generally, is demonstrated by Plaintiffs' allegations above regarding local affiliations and the similarity of wages paid by employers nationally and within the Institution Defendants' respective geographic areas.

Resident Wages Are Stabilized Over Time

140. The wages paid to residents by the Institution Defendants and members of the Defendant Class are stable over time. Adjusted for inflation, the average first-year resident salary has remained virtually unchanged for more than thirty years. In total dollars, the average first-year resident salary has crept up marginally each year to keep pace with inflation, and little if any more.

141. There is great similarity of movement in resident wages over time when considered across the number of years of employment ("PGY") and average resident

salaries are highly correlated between PGYs. The average salary for each PGY increases similarly from year to year, and the differences between average PGY salaries remain about the same over time. In other words, changes in average salary for each PGY are quite uniform from year to year, so for example a first-year resident being paid $1,000 less than a second-year resident may reasonably expect that same differential of $1,000 to exist when he or she becomes a second-year resident and is comparing wages with third-year residents.

142. There is also great similarity of movement in resident wages over time when considered across geographic areas. For example, while the average wage paid by employers in the New York metropolitan area differs somewhat from the average wage paid by employers in the West South Central region of Arkansas, Louisiana, Oklahoma and Texas, the average salary in each of these geographic regions moves similarly to the other from year to year.

143. There is also great similarity of movement in resident wages over time when considered across type of employer ownership as identified by the AAMC/COTH Survey: church, government, non-profit and private. The average salaries for each category of owner move similarly from year to year.

144. There is also great similarity of movement in resident wages over time when considered across type of medical specialty. The average salaries for each specialty move similarly from year to year.

145. The stability of resident wages is even more striking when considered in real terms, i.e., when adjusted for inflation. For example, over the period of 1998 to 2002,

the salaries of assistant professors on medical faculties generally increased significantly while the salaries of PGY-5, PGY-6, PGY-7 and PGY-8 residents fell in real terms, and the salaries of PGY-1, PGY-2, PGY-3 and PGY-4 residents experienced only minute increases in real terms, the largest of which was 1.3%.

146. The depression, standardization and stabilization of resident wages described above would not occur in the absence of Defendants' price-fixing mechanisms, and further demonstrates the existence and effect of Defendants' price-fixing scheme.

PRIOR ANTICOMPETITIVE CONDUCT

147. Physicians, hospitals, and their professional associations have a long history of operating markets in violation of the antitrust laws, including the market which is the subject of this Complaint. In 1996, the Association of Family Practice Residency Directors entered into a consent order and final judgment settling the United States Department of Justice's allegations that the Association had conspired to restrain competition among family practice residency programs by promulgating guidelines which limited recruitment practices and the payment of certain kinds of economic incentives to prospective residents – claims very similar to plaintiffs' claims here. *See United States v. Association of Family Practice Residency Directors*, 1996 WL 557841 (W.D. Mo., Aug. 15, 1996).

148. Physicians, hospitals and their professional organizations have engaged in numerous other anticompetitive and illegal activities including, for example, explicit price-fixing. *See, e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (fixing physicians'

fees); *United States v. Utah Society for Healthcare Human Resources Administration*, 1994 WL 729931 (D. Utah, Sept. 14, 1994) (fixing nurses' salaries); and *In the Matter of Michigan State Medical Society*, 101 F.T.C. 191 ("Final Order," Feb. 17, 1983) (fixing physicians' fees).

149. These entities have also been involved in boycotting members of competing professions. *See, e.g.*, *Hahn v. Oregon Physicians' Service*, 868 F.2d 1022 (9th Cir. 1989) (podiatrists); *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982) (psychologists); *Wilk v. American Medical Ass'n*, 895 F.2d 352 (7th Cir. 1990) (chiropractors); *Weiss v. York Hospital*, 745 F.2d 786 (3d Cir. 1984) (osteopathic physicians); *American Medical Ass'n v. Federal Trade Commission*, 638 F.2d 443 (2d Cir. 1980) (affirming an FTC order and opinion prohibiting the AMA from restraining competition by limiting physicians' ability to contract with non-physicians); *Virginia Academy of Clinical Psychologists v. Blue Shield of Virginia*, 624 F.2d 476 (4th Cir. 1980) (psychologists); *American Medical Ass'n v. United States*, 130 F.2d 233 (D.C. Cir. 1942) (group health association); and *Sweeney v. Athens Regional Medical Center*, 709 F. Supp. 1563 (M.D. Ga. 1989) (nurse-midwives).

COUNT I

PRICE-FIXING IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1

(AGAINST INSTITUTION DEFENDANTS, MEMBERS OF THE DEFENDANT CLASS AND DEFENDANTS AAMC, AMA AND ACGME)

150. Plaintiffs reallege and incorporate by reference each and every allegation set forth above.

151. The Institution Defendants, members of the Defendant Class, and Defendants AAMC, AMA, and ACGME have each contracted, combined and conspired to unreasonably restrain interstate trade and commerce in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

152. The contract, combination and conspiracy alleged in Count I consists of a continuing comprehensive agreement, understanding, and concert of action among the Institution Defendants, members of the Defendant Class, and Defendants AAMC, AMA and ACGME to fix prices for the compensation of resident physicians through the mechanisms described above, including:

a. price-fixing through the exchange of competitively sensitive information regarding resident physician compensation and other terms of employment in the AAMC/COTH Survey;

b. price-fixing through the exchange of competitively sensitive information regarding resident compensation and other terms of employment in the AMA/AAMC National GME Census;

c. price-fixing through a wage-restrictive AMA "Salary Guideline" and "ethical rule;" and

d. price-fixing through certain wage-restrictive ACGME accreditation policies and procedures.

153. Plaintiffs allege that each of these mechanisms is part of a greater, comprehensive price-fixing scheme among all Defendants to fix, depress, standardize and stabilize resident compensation in violation of Section 1 of the Sherman Act.

154. The illegal price-fixing alleged herein has the purpose and effect of artificially fixing, depressing, standardizing and stabilizing resident physician compensation and other terms of employment.

155. Each of the Institution Defendants, members of the Defendant Class, and Defendants AAMC, AMA, and ACGME has participated in one or more overt acts in furtherance of the contract, combination and conspiracy alleged herein and has participated in the conspiratorial activities described.

156. During the Class Period, Plaintiffs and members of the Plaintiff Class were injured by the price-fixing alleged herein. Among other things, Plaintiffs and members of the Plaintiff Class were compensated substantially less for their services than they would have been in the absence of the illegal mechanisms. Plaintiffs and members of the Plaintiff Class have sustained substantial losses and damage to their business and property as a result of the illegal price-fixing.

COUNT II

RESTRAINT OF TRADE AND PRICE-FIXING IN VIOLATION OF SECTION 1 OF THE SHERMAN ACT, 15 U.S.C. § 1 AS ALLEGED IN PLAINTIFFS' ORIGINAL COMPLAINT

(AGAINST ALL DEFENDANTS)

157. The National Resident Matching Program ("NRMP") is a Defendant as to this Count II only. NRMP is an Illinois not-for-profit corporation with its principal office in Washington, D.C.

158. Plaintiffs reallege and incorporate by reference each and every allegation, legal conclusion, claim, request for relief and other aspect of the pleading set forth in their original Complaint, filed May 7, 2002 against all Defendants herein, specifically NRMP, AAMC, AMA, ACGME, the Institution Defendants, and members of the Defendant Class.

159. Plaintiffs do not reallege the claim set forth in their original Complaint as to entities who were originally defendants but are not named as defendants herein, specifically Yeshiva University, Washington University Medical Center, the American Hospital Association ("AHA"), the American Board of Medical Specialties ("ABMS"), and the Council of Medical Specialty Societies ("CMSS").

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and the Plaintiff Class on Count I pray for judgment against the Institution Defendants, members of the Defendant Class, and Defendants AAMC, AMA, and ACGME, jointly and severally, and on Count II pray for judgment against all Defendants, jointly and severally, as follows:

A. certifying this action as a plaintiff class action pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, certifying Plaintiffs as Class Representatives and designating their counsel as Plaintiff Class Counsel;

B. certifying this action as a defendant class action pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure, certifying Institutional Defendants as

Class Representatives and designating their counsel as Defendant Class Counsel;

C. pursuant to Section 16 of the Clayton Act, 15 U.S.C. § 26, enjoining all aspects of Defendants' and the Defendant Class' continuing violation of Section 1 of the Sherman Act;

D. entering judgment against Defendants and the Defendant Class in favor of Plaintiffs and the Plaintiff Class and awarding Plaintiffs and the Plaintiff Class three times actual damages against Defendants and the Defendant Class, jointly and severally, for their violation of Section 1 of the Sherman Act set forth herein;

E. granting Plaintiffs and the Plaintiff Class the costs of prosecuting this action, together with pre- and post-judgment interest and reasonable attorneys' fees and costs; and

F. granting such other relief as this Court may deem just and proper under the circumstances.

JURY DEMAND

Plaintiffs demand trial by jury on all issues so triable.

Dated: August 26, 2004 Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

PAUL JUNG, M.D., *ET AL.*,

Petitioners,

v.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *ET AL.*,

Respondents.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners' complaint alleged that the National Resident Matching Program (the "Match") was the centerpiece of a single "highly intertwined" conspiracy that violated Section 1 of the Sherman Act, 15 U.S.C. § 1. Congress responded to the suit by enacting Section 207 of the Pension Funding Equity Act of 2004, 15 U.S.C. § 37b ("Section 207"), which expressly provides that an antitrust claim may not be based on Match-related conduct. Relying on Section 207, the district court dismissed the complaint, and the court of appeals affirmed *per curiam* in a not-for-publication order.

The Petition presents the following questions:

1. Did the lower courts correctly conclude that, in light of Section 207, petitioners' complaint should be dismissed because their claim was based on Match-related conduct?

2. Did the lower courts correctly conclude that Section 207 does not violate the constitutional doctrine of separation of powers?

3. Did the district court abuse its discretion in concluding that dismissal of petitioners' complaint should be with prejudice?

4. Was petitioners' post-judgment motion under Fed. R. Civ. P. 59(e) time-barred because, after expiration of the ten-day jurisdictional period, petitioners abandoned the original basis for their motion and substituted a different theory for post-judgment relief; and, if not, did the district court abuse its discretion in denying the motion on its merits?

LIST OF PARTIES AND RULE 29.6 STATEMENT

Petitioners correctly identify the defendants below. The corporate disclosure statements required under Rule 29.6 appear in the accompanying appendix.

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STATUTES INVOLVED

The Petition quotes only excerpts from Section 207 of the Pension Funding Equity Act of 2004, 15 U.S.C. § 37b. *See* Pet. 2. The full text of Section 207, including omitted portions that bear directly on the issues presented, is set forth at Pet. App. 159-63.

STATEMENT OF THE CASE

1. For more than 50 years, medical students and teaching hospitals have used a computerized matching system to align the respective preferences of graduating medical students and graduate medical residency programs to which the students apply. Commonly known as "the Match," the system is operated by the National Resident Matching Program, a non-profit entity whose board of directors includes representatives of medical student organizations as well as associations of medical schools and teaching hospitals. Pet. App. 160. Congress described the operation of the Match as follows:

> "The Match uses a computerized mathematical algorithm, as students had recommended, to analyze the preferences of students and residency programs and match students with their highest preferences from among the available positions in residency programs that listed them. Students thus obtain a residency position in the most highly ranked program on their list that has ranked them sufficiently high among its preferences. Each year, about 85 percent of participating United States medical students secure a place in one of their top 3 residency program choices." Pet. App. 160.

Petitioners are three former medical residents. Their complaint alleged a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and sought treble damages and injunctive relief against 36 teaching hospitals, medical schools, and non-profit associations involved in graduate medical education. The complaint alleged a plaintiff class of more than 200,000 current and former medical residents, as well as a defendant class of more than 1000 teaching hospitals and other entities that participate in the Match. Neither a plaintiff class nor a defendant class had been certified prior to dismissal of the action.[1]

Petitioners' single-count complaint alleged a long-standing conspiracy that had the effect of depressing the level of stipends received by medical residents during their post-graduate training. The district court (Hon. Paul L. Friedman) observed that petitioners alleged "a single conspiracy with three interacting prongs": the Match, certain accreditation requirements for residency programs, and two information programs that collected and disseminated data about residency positions. Pet. App. 111.

Petitioners did not allege a traditional price-fixing conspiracy. Rather, they claimed that the three prongs of their conspiracy -- all of which were public, long-standing programs -- operated together with the effect of restraining competition over stipend levels. *E.g.*, Pet. App. 23 ("The complaint does not allege a price-fixing conspiracy but a single overarching integrated antitrust conspiracy with the Match as its centerpiece."); *id.* 26 ("Their pleading does not allege an agreement among residency programs to fix wages paid to residents.") (Order of the district court). The Match allegations were not mere "plus factors" in a standard price-fixing conspiracy case, as petitioners now inaccurately represent. Pet. 3, 5, 8. Rather, the Match was the "centerpiece" and "unifying element" of their claim. Pet.

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[1] The original complaint is not included in the Petition's appendix, but petitioners' post-judgment proposed amended complaint contains similar class allegations. *See* Pet. App. 187-90.

App. 23, 48 (Orders of the district court). In the words of the court of appeals: "The central premise of plaintiffs' complaint and its theory of liability turn entirely on the Matching Program." *Id.* 5.[2]

2. In direct response to this suit, Congress enacted Section 207 of the Pension Funding Equity Act of 2004, 15 U.S.C. § 37b ("Section 207"), entitled "Confirmation of Antitrust Status of Graduate Medical Resident Matching Programs." Pet. App. 159-63. The statute, signed into law in April 2004, provides that participation in medical residency matching programs is not unlawful under the antitrust laws and that such participation may not be used to support any antitrust claim. § 207(b)(2). Section 207 includes extensive congressional findings on the history and purposes of the Match, and concludes that matching programs "have been an integral part of an educational system that has produced the finest physicians and medical researchers in the world." § 207(a)(1)(A).

In Section 207, Congress observed that antitrust lawsuits "challenging the matching process, regardless of their merit or lack thereof, have the potential to undermine this highly efficient, pro-competitive, and long-standing process." § 207(a)(1)(E). Congress expressed concern that the "costs of defending such litigation would divert the scarce resources of our country's teaching hospitals and medical schools from their crucial missions of patient care, physician training, and medical research," potentially "lead[ing] to abandonment of the matching process, which has effectively served the interests of medical students, teaching hospitals, and patients for over half a century." *Id.*

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[2] The suggestion (Pet. 4) that this case bears any relation to *Twombly v. Bell Atlantic Corp.*, 425 F.3d 99 (2d Cir. 2005), *cert. granted*, 126 S. Ct. 2965 (2006) (No. 05-1126), is plainly wrong. Here, petitioners challenged specific practices involved in graduate medical education; and did not allege a "parallel conduct with plus factors" price-fixing conspiracy. Indeed, petitioners never used the term nor advanced the concept of "plus factors" in any of their briefs or pleadings below.

Accordingly, Congress provided that participation in the Match was not a violation of the antitrust laws:

> "It shall not be unlawful under the antitrust laws to sponsor, conduct, or participate in a graduate medical education residency matching program, or to agree to sponsor, conduct, or participate in such a program."

§ 207(b)(2). Further, in a second important operative provision, Congress provided that Match-related conduct could not be used to support any claim of an antitrust violation:

> "Evidence of any of the conduct described in the preceding sentence [just quoted above] shall not be admissible in Federal court to support any claim or action alleging a violation of the antitrust laws." *Id.*

As petitioners emphasize (*e.g.*, Pet. 5, 7, 9-10), Section 207 also contained a saving clause, but one framed in much narrower terms than petitioners acknowledge:

> "Nothing in this section shall be construed to exempt from the antitrust laws any agreement on the part of 2 or more graduate medical education programs to fix the amount of the stipend or other benefits received by students participating in such programs."

§ 207(b)(3). As noted above, petitioners' complaint made no allegation of that nature.

By its terms, Section 207 was immediately effective and explicitly made applicable to pending suits. § 207(c).

3. In light of Section 207, defendants moved for judgment on the pleadings or, in the alternative, for dismissal for failure to state a claim. Given that various other motions were then pending, the district court "request[ed] guidance from the parties as to the most appropriate course of action

the Court should take in considering these various motions." Order of May 19, 2004. In response, making no mention of a potential amendment of their complaint to address the implications of Section 207, petitioners requested that the court first decide a motion that they had filed some months earlier (in March 2004, before the enactment of Section 207) requesting leave to file an *earlier* proposed amended complaint (*not* the amended complaint they proposed post-judgment (Pet. App. 164-237)) and then decide defendants' Section 207 motion.[3]

Thus, despite the enactment of Section 207, petitioners rested on their original theory -- embodied both in the original complaint and in their March 2004 proposed amended complaint -- that they had been injured by "a single conspiracy with three interacting prongs" (Pet. App. 111) with the Match at its center. Indeed, by that time the theory had also been endorsed by petitioners in multiple prior pleadings as well as in deposition testimony by each of them.[4]

The district court granted defendants' motion and dismissed the case. Observing that petitioners' complaint had alleged "a single overarching integrated antitrust conspiracy with the Match as its centerpiece" (Pet. App. 23), the court held that their complaint fell squarely within, and was precluded by, the new antitrust exemption:

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[3] The district court's Order of May 19, 2004, and petitioners' response, are found in the Joint Appendix prepared for the court of appeals (hereinafter "JA") at JA707-08 and JA710-11 respectively.

Petitioners did not argue to the district court -- and do not argue here -- that the amended complaint that they had proposed in March 2004 was any less vulnerable to dismissal under Section 207 than their original complaint.

[4] *E.g.*, JA173 (petitioners' brief on motion to dismiss); JA314-17, 429-30 (oral argument on motion to dismiss); JA908-12, JA914, JA917-21, JA925-26 (deposition testimony).

> "The Court concludes that the allegations concerning the Match and the institutional defendants' participation in the Match are so interdependent that the Court cannot separate them from the remaining allegations. Because Congress has prevented this or any other Federal court from considering evidence of Match-related conduct, the Court necessarily concludes that plaintiffs' complaint must be dismissed . . . ." *Id.* 25-26.

In response to petitioners' efforts to invoke Section 207's saving clause, the district court found no tension between (a) the provision in Section 207(b)(2) barring Match-related evidence in *any* antitrust claim and (b) Section 207(b)(3)'s preservation of any claim of an agreement to fix the amount of stipends: "Application of the [evidentiary] provision merely forbids invocation of the Match program as evidence in any antitrust suit, including one involving allegations of price-fixing; but price-fixing claims unrelated to the Match as described in Section 207(b)(3) are not affected." Pet. App. 27. The district court concluded that because petitioners' complaint "does not allege an agreement among residency programs to fix wages paid to residents," it fell outside the saving clause. *Id.* 26.

The district court also rejected petitioners' constitutional challenge to Section 207. In addressing their separation-of-powers argument, the court observed that Section 207 had "add[ed] a new antitrust exemption to the antitrust laws and new procedural or evidentiary restrictions on the prosecution of certain antitrust actions"; it did not, however, "prescribe a different finding, conclusion or result in the outcome of this or any other particular antitrust case." Pet. App. 31-32. Accordingly, in light of ***Robertson v. Seattle Audubon Society***, 503 U.S. 429 (1992), and other authority, the court concluded that Section 207 represented a proper exercise of Congress's power to amend legislation, even if the amendment potentially affected the outcome of pending litigation. Pet. App. 32.

The district court dismissed the complaint with prejudice and entered final judgment for the defendants. As of that time, petitioners had expressed no desire or intention to file a Match-free amended complaint in light of Section 207, and made "no attempt to demonstrate that absent the Match allegations . . . a conspiracy claim existed . . . ." Pet. App. 25. The district court further noted that "the burden cannot be on the Court to effectively rewrite the complaint . . . ." *Id.*

4. Before the ten-day jurisdictional deadline set forth in Fed. R. Civ. P. 59(e), petitioners filed a motion to alter or amend the judgment. Without challenging the correctness of the district court's ruling, including its dismissal of the complaint with prejudice, petitioners sought to modify the judgment to allow the filing of yet another amended complaint. The Rule 59(e) motion incorporated a motion, under Rule 15(a), for leave to file an amended complaint in which plaintiffs sought to allege -- for the first time and notwithstanding their prior pleadings and testimony -- an antitrust conspiracy based solely on the accreditation and information-dissemination prongs of the original complaint. Pet. App. 164-237. The sole ground stated in the Rule 59(e) motion was the potential *res judicata* effect of dismissal on the three named plaintiffs.

After defendants responded to the post-judgment motions, petitioners made a new filing -- well outside the ten-day jurisdictional bar -- that explicitly abandoned the sole ground on which they had sought post-judgment relief. Although styled as a "reply," in that filing petitioners asserted new and different theories for modification of the judgment. JA930-31 n.6. In a surreply, defendants pointed out that petitioners' "reply" was in reality a new Rule 59(e) motion that was jurisdictionally time-barred. *See* Pet. App. 46 n.1.

The district court denied all of petitioners' post-judgment motions. The court concluded that petitioners had not met the standards for relief under Rule 59(e), given that, *inter alia*, "[p]laintiffs had both the time and the opportunity to request leave to amend their complaint prior to the Court's entry of judgment, but chose not to." Pet. App. 46. In the alternative, the court denied plaintiffs' motion to amend under Rule 15(a). The court found that, even under the liberal standards of that rule, amendment would be futile because petitioners' proposed complaint was starkly inconsistent with their own previous positions and the court's prior rulings (Pet. App. 47-48), and would be subject to successful renewed motions to dismiss both on personal-jurisdiction and merits grounds (*id.* 48-49).

Because the district court rejected plaintiffs' motions on the merits, it did not reach defendants' argument that petitioners' Rule 59(e) motion was time-barred. Pet. App. 46 n.1.

5. The court of appeals (Randolph, Griffith, and Edwards, J.) affirmed *per curiam* in a not-for-publication order. The court first held that the district court had correctly construed Section 207 to require dismissal of the complaint. Indeed: "It is hard to imagine a more precise fit between the language of a statute and a lawsuit." Pet. App. 3-4. The court recognized that petitioners' conspiracy claim fell squarely within Section 207's prohibition of antitrust claims based on Match-related conduct, as their conspiracy allegations were "inextricably intertwined" with the Match. *Id.* 4. Petitioners' "attempt to recast the allegations of the complaint as a price-fixing scheme independent of the Matching Program" was rejected because "[t]he complaint does not allege a price-fixing conspiracy, but a single over[arch]ing integrated antitrust conspiracy with the Match as its centerpiece." *Id.*, quoting the district court at *id.* 23. Recognizing that a price-fixing claim unrelated to the Match would fall within Section 207's saving clause, the court of appeals confirmed that petitioners' claim was not of that nature: "The Matching Program is the basis for plaintiffs' complaint . . . ." *Id.* 3.

The court of appeals had no difficulty disposing of petitioners' constitutional objection to Section 207. "Congress has done nothing more here than amend the antitrust laws by carving out a safe harbor for participation in [the Match]." Pet. App. 4. As confirmed by *Seattle Audubon* and other decisions of this Court, "Congress may amend substantive laws, even when doing so affects pending litigation." *Id.*

As for petitioners' argument that their complaint should not have been dismissed with prejudice, the court of appeals found no abuse of discretion. It recognized, as had the district court, that any amended complaint that sought to avoid Section 207 would be wholly at odds with the "central premise of plaintiffs' complaint and its theory of liability." Pet. App. 5-6.

Finally, the court of appeals affirmed the district court's denial of petitioners' post-judgment motions. "A Rule 59(e) motion is discretionary and need not be granted unless the district court finds that there is an intervening change of controlling law, the availability of new evidence, or the need to correct clear error or prevent manifest injustice." Pet. App. 6-7 (internal quotations omitted). The court of appeals recognized that none of those factors was present here: the decision below neither contained clear error nor threatened manifest injustice. Further, recognizing that for several months after enactment of Section 207 petitioners took no steps to amend their complaint in light of the legislation -- and instead waited until after final judgment had been entered -- the court found no abuse of discretion in the district court's denial of the Rule 59(e) motion. *Id.* Rather, "'[b]y failing to advise the court in a timely fashion -- i.e., before the court ruled on the motion to dismiss' -- that they were willing to amend their Complaint in light of Section 207, plaintiffs 'forfeited any claim of an abuse of discretion.'" *Id.* at 7, quoting *Ciralsky v. CIA*, 355 F.3d 661, 673 (D.C. Cir. 2004).[5]

The court of appeals concluded its ruling as follows:

> "Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program." *Id.*

REASONS FOR DENYING THE PETITION

This case does not warrant the Court's review. The decisions below were the first ever to deal with the newly-enacted Section 207, and, as reflected in the unpublished decision of the court below, that statutory provision presents no issue requiring resolution by this Court. The lower courts were clearly correct in construing and applying the statute to the facts of this case, and petitioners' separation-of-powers argument is plainly without merit. There is no circuit split on these issues and no conflict with any decisions of this Court.

Nor do petitioners' two procedural issues -- whether dismissal should have been with prejudice and whether post-judgment relief should have been granted -- merit further review. Both are subject to the abuse-of-discretion standard, and on the facts here the district court's actions were entirely warranted -- as the court of appeals found. Petitioners deliberately and steadfastly committed themselves to a claim at odds with Section 207, and purposely waited until after judgment -- despite ample opportunities and a virtual invitation from the district court to act earlier -- to float a markedly different claim that was at odds with their prior theories, representations to the district court, and sworn deposition testimony. Any purported differences in the standards articulated by various lower courts are, on the facts here, of no moment. That is especially true given both that the district court found petitioners' post-judgment complaint deficient even under liberal Rule 15(a) standards, and that petitioners' Rule 59(e) motion was untimely.

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[5] In light of its ruling on the merits of the Rule 59(e) motion, the court of appeals neither reached petitioners' Rule 15(a) arguments nor addressed defendants/appellees' argument that the Rule 59(e) motion was time-barred. *See* Pet. App. 7.

A. The Application of Section 207

Section 207 is a clearly drafted statute that raises no difficult issue of construction. Section 207(b)(2) provides that participation in the Match is not unlawful under the antitrust laws, and that no evidence of Match participation can be used to support *any* antitrust claim. Section 207(b)(3) provides that nothing in the statute exempts from the antitrust laws an agreement between medical residency programs to fix the amount of stipends. Thus, no antitrust claim -- including a Sherman Act § 1 conspiracy claim that may relate to pricing -- can be based on evidence of Match participation, but any claim alleging a conspiracy to fix stipend levels remains actionable if it can be proven without reliance on Match participation. These provisions effectuate the purposes of Section 207, which are expressly stated in the statute itself: to protect the Match from antitrust attack and to protect medical residency programs from having to defend against antitrust suits based in whole or in part on Match participation. § 207(a)(1), (2), Pet. App. 159-61.[6]

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[6] By quotation to Justice Scalia's concurrence in *Intel Corp. v. Advanced Micro Devices, Inc.*, 542 U.S. 241, 267 (2004) (Pet. at 2, 9), petitioners seem to imply that the lower courts impermissibly relied on legislative history in construing Section 207. In fact, neither of the lower courts even referred to legislative history. *See* Pet. App. 3-4, 20-27. Both construed Section 207 relying entirely on its unambiguous statutory language.

Particularly on the facts of this case, application of Section 207 was straightforward. As the court of appeals observed: "It is hard to imagine a more precise fit between the language of a statute and a lawsuit." Pet. App. 3-4. Petitioners' single-count conspiracy claim was "inextricably intertwined" with their Match allegations (*id.* 4), with the complaint alleging "a single overriding integrated antitrust conspiracy with the Match as its centerpiece" (*id.*). Indeed, the Match was the "central premise of plaintiffs' complaint and its theory of liability." *Id.* 5. As they do here, petitioners later "attempt[ed] to recast the allegations of the complaint as a price-fixing scheme independent of the Matching Program" (*id.* 4), but both the district court and court of appeals properly rejected those efforts to rewrite history. *See id.* 4, 23 ("The complaint does not allege a price-fixing conspiracy . . . ."), 24 ("plaintiffs' current position is inconsistent with plaintiffs' own previous position as set forth in their earlier filings").[7]

The lower courts properly rejected petitioners' implausible reading of the saving clause. It does not preserve all antitrust claims that allege some *impact* on resident stipends (which would largely nullify the section's operative provisions), but instead is limited to "any agreement on the part of 2 or more graduate medical education programs to *fix the amount* of stipend or other benefits . . . ." § 207(c) (emphasis added). As the courts below observed, petitioners made no allegations of that sort. Moreover, there is no tension between the saving clause and Section 207(b)(2)'s bar on use of Match-related evidence to support *any* antitrust claim. If, without Match-related evidence, a plaintiff can prove an agreement within the scope of the saving clause, the claim is preserved. If not, the claim is barred.

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[7] Petitioners claim that the lower courts' characterizations of their complaint are "inaccurate." Pet. 8. However, the two lower courts -- in full agreement with each other -- accurately described the complaint, and their descriptions were confirmed repeatedly by petitioners' own representations in the district court. *See, e.g.*, note 4 *supra*. In any event, any asserted misreading of their complaint hardly raises an issue of sufficient importance to warrant an exercise of this Court's supervisory powers.

This common-sense reading of Section 207 does not render the saving clause "a nullity," as petitioners argue. Pet. 8. Suppose, for example, that a plaintiff could prove -- independently of Match evidence -- that two residency programs in the same city had reached an agreement to fix the amount of stipends for first-year radiology residents. The saving clause ensures that the defendants in such a case could not claim Section 207 immunity on the ground that the residents were selected by the defendants through the Match. If a plaintiff can prove an illegal agreement without reference to Match evidence, Section 207 provides no shelter.

A statute should be construed in its entirety, taking into account its purpose and context. *Dolan v. U.S. Postal Serv.*, 126 S. Ct. 1252, 1257 (2006). *See also United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not . . . construe statutory phrases in isolation; we read statutes as a whole."). The lower courts followed this maxim of construction and correctly applied Section 207 to the facts of this case.

B. The Constitutionality of Section 207

While statutes should be construed if possible to avoid "*serious* constitutional problems" (*Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (emphasis added) (*see* Pet. 10), this principle does not call for distortion of statutory language whenever a litigant makes a constitutional challenge. Here, no serious constitutional issue is present. As this Court has repeatedly recognized, the Constitution is not implicated when Congress amends the governing law even when doing so affects pending cases. *E.g.*, *Robertson v. Seattle Audubon Soc'y*, 503 U.S. 429 (1992). That is all that happened here.

Petitioners' contrary argument (Pet. 10-13) rests on *United States v. Klein*, 80 U.S. 128 (1871), a case from the Reconstruction era. There, Congress enacted legislation that purported to reverse the effect of pardons issued by President Andrew Johnson, directing this Court (and lower courts) to treat pardons as conclusive proof of collusion with the Confederacy, rather than the opposite as specified in the pardons themselves. Klein had relied on a pardon to obtain a judgment against the United States (to recover property confiscated by the Union army), and the legislation specifically directed the Court to vacate such judgments and to replace them with judgments for the government. 80 U.S. at 134. The Court struck down the legislation as infringing the President's constitutional pardon powers and also as violating the principle of separation of powers. As to the latter point, the legislation did not alter the governing law, but instead barred the court from giving "the effect to evidence which, in its own judgment, such evidence should have, *and . . . directed [the court] to give it an effect precisely the opposite*." *Id.* at 147 (emphasis added).[8]

As the Court later observed, *Klein* held only "that [the Court] would not serve as an instrument toward the legislative end of changing the effect of a Presidential pardon." *United States v. Sioux Nation of Indians*, 448 U.S. 371, 405 (1980). *Klein* has been read narrowly,[9] and indeed no case

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[8] Petitioners quote this sentence three times (Pet. 11, 12-13), but each time omit the important italicized clause. Significantly, Section 207 did not direct any court to make any particular factual findings.

[9] *See, e.g.*, *United States v. Brainer*, 691 F.2d 691, 695 & n.7 (4th Cir. 1982) (*Klein* should be read "quite narrow[ly]," for "[a] broader reading . . . would conflict with the Supreme Court's recognition that, subject to the requirements of due process, 'Congress has power to prescribe what evidence is to be received in the courts of the United States.'") (quoting *Tot v. United States*, 319 U.S. 463, 467 (1943)); *Shawnee Tribe v. United States*, 423 F.3d 1204, 1217 (10th Cir. 2005) (Continued...)

has ever applied the decision to invalidate legislation that changed either substantive or evidentiary rules, even when those changes affected the outcome of pending cases. Congress frequently adopts evidentiary exclusions,[10] and we are aware of none that has been held unconstitutional on separation-of-power grounds.[11]

Petitioners' reliance on *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211 (1995) (Pet. 11), is equally misplaced, as that case involved the distinct issue of whether Congress could require federal courts to reopen final judgments that had been entered before a statute's enactment. In fact, *Plaut* wholly undermines the argument petitioners advance here, as the Court observed in *Plaut*: "Whatever the precise scope of

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("Although *Klein* might be read broadly, it has been significantly limited by subsequent Supreme Court decisions.").

[10] *E.g.*, 15 U.S.C. § 4305(g)(2) (no action by the Attorney General or FTC pursuant to the notification provision of the National Cooperative Research and Production Act "shall be admissible into evidence . . . for the purpose of supporting or answering any claim under the antitrust laws"); 49 U.S.C. § 10706(a)(3)(B)(ii) ("[i]n any proceeding in which [an antitrust violation] is alleged, evidence of a discussion or agreement between or among such rail carrier[s] . . . shall not be admissible . . ."); 15 U.S.C. § 2074(b) ("The failure of the Commission to take any action or commence a proceeding with respect to the safety of a consumer product shall not be admissible . . . .").

[11] *See* Gordon G. Young, *Congressional Regulation of Federal Courts' Jurisdiction and Processes: United States v. Klein Revisited*, 1981 Wis. L. Rev. 1189, 1233-38 (1981) ("it is clear that *Klein* does not contain a holding striking down a congressional attempt to interfere with the Court's evidentiary or fact-finding processes"). Petitioners attempt to cast Congress' enactment of Section 207 as the act of a trespasser who "may not interfere with the Judiciary's proper fact-finding" (Pet. 11), but Congress has a major role in developing evidentiary rules, including the Federal Rules of Evidence adopted by orders of this Court. *E.g.*, *United States v. Abel*, 469 U.S. 45, 49 (1984) ("It must be remembered that Congress extensively reviewed our submission [on the Rules], and considerably revised it.").

Klein . . . later decisions have made clear that its prohibition does not take hold when Congress amends applicable law." 514 U.S. at 218 (internal punctuation omitted). Those later decisions include *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), which the courts below found controlling. *Seattle Audubon* upheld a statute enacted in response to environmental challenges to proposed timber harvesting. The statute set forth new conditions for such harvesting and stated: "Congress hereby determines and directs that" compliance with those conditions would satisfy statutory requirements that had formed the basis of the pending environmental suits. *Id.* at 433-35. The Ninth Circuit held the statute unconstitutional under *Klein*, but this Court reversed. The Court held the statute did not "direct any particular findings of fact or applications of law, old or new, to fact," but rather modified the governing substantive law. 503 U.S. at 438.[12]

Seattle Audubon is illustrative of many cases upholding Congress's power to enact legislation, similar to Section 207, that affects the course of pending litigation. *E.g.*, *National Coalition to Save Our Mall v. Norton*, 269 F.3d 1092, 1096 (D.C. Cir. 2001) (*Klein* "cannot be read as a prohibition against Congress's changing the rule of decision in a pending case, or (more narrowly) changing the rule to assure [an] outcome [for a particular litigant]."); *Imprisoned Citizens*

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[12] *See* 1 Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 284 (3d ed. 2000):

> "The lesson of *Seattle Audubon* is that Congress is not barred by separation-of-powers considerations from changing the law applicable to an identifiable set of cases pending in the federal courts, even when that is Congress' clear purpose, provided it does so by altering the background law *itself* and not by purporting to tell Article III judges how they are to *apply* pre-existing law to particular cases pending in their courts." (Emphasis in original.)

Union v. Ridge, 169 F.3d 178, 187-88 (3d Cir. 1999) (*Klein* does not bar legislation that changes the law, only legislation that compels particular results under old law); *Ozee v. American Council on Gift Annuities*, 143 F.3d 937 (5th Cir. 1998) (applying newly enacted antitrust immunity to dismiss a pending suit). So long as Congress changes the governing law and does not simply direct a specific result under prior law, no *Klein* issue is present.

For that reason, there is no *Klein* issue in this case. As the lower courts here recognized, Section 207 unambiguously altered substantive legal rights and obligations. It provides an explicit antitrust exemption for Match participation, and it adopts a new evidentiary rule for antitrust cases brought in federal court, effectively creating a statutory exception to the *American Tobacco* doctrine upon which petitioners relied below in opposing early motions to dismiss.[13] As the district court stated, "by enacting [Section 207,] Congress changed the scope of permissible antitrust claims that may be resolved by the Federal courts" (Pet. App. 31); it did so in a manner that "has application to actions beyond this lawsuit" (*id. 32*); and it did not "prescribe a different finding, conclusion, or result in the outcome of this or any other particular antitrust case" (*id.*). *See also id.* 4-5 (similar analysis by the court of appeals). Accordingly, no constitutional issue under *Klein* or any other decision of this Court is presented here.[14]

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[13] *See American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946) (acts "in themselves wholly innocent" may nonetheless be part of a conspiracy if such acts are undertaken "to accomplish the unlawful objective"). *See also* Pet. 10 (invoking *American Tobacco*).

[14] Petitioners object to the "one-way" feature of Section 207(b)(2), as it appears to preclude Match evidence only "to support" an antitrust claim. Pet. 12-13. However, the Federal Rules of Evidence are frequently asymmetrical, allowing evidence to be used for one purpose but not another, or by one party but not the other. *See, e.g.*, Rule 404(b) (evidence of prior crimes or acts admissible for some purposes but not others); 404(a)(1) (Continued...)

C. Dismissal of the Complaint with Prejudice

The district court dismissed the complaint with prejudice, and the court of appeals found no abuse of discretion. The rulings were correct and do not warrant further review. Dismissal for failure to state a claim is appropriate "if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" of the complaint. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984), citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).[15] Here, the dismissal was not for a technical pleading defect but instead was "on the merits." Under Section 207, petitioners' claim was fundamentally unsound and required that the litigation not go forward. *See, e.g., Rogers v. Stratton Indus., Inc.*, 798 F.2d 913, 917 (6th Cir. 1986) ("Where a statutory right is being pursued . . . and the defense raised is that the plaintiff or defendant does not come within the purview of the statute, the judicial acceptance of the defense, however it is accomplished, is the death knell of the litigation . . . .").

In claiming that dismissal with prejudice in this case was inconsistent with decisions of this Court and other circuits

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("[e]vidence of a person's character or a trait of character is not admissible [by the prosecution] for the purpose of proving action in conformity therewith on a particular occasion," but may be offered by the accused to prove his own good character); 609 (evidence of prior conviction admissible for some purposes but not others); 803(8)(C) (defendant may introduce evidence of public records against the government, but the government cannot offer such evidence against a defendant). We are aware of no decisions questioning such rules on constitutional grounds.

[15] A dismissal for failure to state a claim is presumptively on the merits and with prejudice. *See* Rule 41(b); *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 505-06 (2001) (Rule 41(b)'s provision that a dismissal order is presumptively "upon the merits" means that the dismissal is with prejudice).

(Pet. 13-20),[16] petitioners fail to recognize the distinction between a court's dismissal with prejudice and a court's denial of a motion for leave to amend. While both actions are reviewed under the abuse-of-discretion standard, they are nonetheless distinct (although at times related) steps in the litigation and subject to different standards in the district court.[17]

Petitioners rely heavily on *Foman v. Davis*, 371 U.S. 178 (1962), but -- contrary to their representation (Pet. 13) -- that decision did not address when a complaint should or should not be dismissed with prejudice; it addressed only the issue of when a motion for leave to amend a complaint should be granted. (In addition, petitioners misstate the holding of *Foman* on that issue. *See* Part D *infra*.) Likewise, a number of the cases cited by petitioners for their proposed standard for dismissal with prejudice are appeals from denials of motions for leave to amend -- not challenges to a dismissal with prejudice where, as here, the amended complaint in question had not been offered prior to dismissal.[18]

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[16] Petitioners appear to be primarily concerned with the development of the law in the Ninth Circuit. Pet. 16-17. A case from that circuit would be a better vehicle to address any certiorari-worthy questions related to that court's treatment of dismissals with prejudice.

[17] *See, e.g.*, *Brereton v. Bountiful City Corp.*, 434 F.3d 1213, 1219 (10th Cir. 2006) ("denial of leave to amend and dismissal with prejudice are two separate concepts").

[18] *E.g.*, *Doe v. Cassel*, 403 F.3d 986, 991 (8th Cir. 2005); *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 805 (6th Cir. 2005). Others simply do not support petitioners' position. *See U.S. ex rel. Adrian v. Regents of the University of California*, 363 F.3d 398, 403 (5th Cir. 2004) (affirming dismissal with prejudice without leave to file a new amended complaint); *Van Buskirk v. The New York Times Co.*, 325 F.3d 87, 91 (2d Cir. 2003) (affirming dismissal with prejudice; "a district court need not as a matter of course dismiss a complaint without prejudice to an attempted amendment of the pleadings").

It is well-established that it is a matter of discretion, not legal error, if a district court declines *sua sponte* to offer a plaintiff an opportunity to amend a complaint where the amendment in question is not offered prior to judgment.[19] Much depends on the nature of the defect in the initial complaint. Where a pleading suffers from a readily curable technical defect, as in many of the cases cited by petitioners (Pet. 15), dismissal will generally be with leave to amend. *E.g.*, *Lebron-Rios v. U.S. Marshal Serv.*, 341 F.3d 7, 15 (1st Cir. 2003) (failure to exhaust administrative remedies prior to filing suit); *Ostrzenski v. Seigel*, 177 F.3d 245, 252-53 (4th Cir. 1999) (failure to plead with sufficient specificity to provide notice of the claim).[20] But this does not in any way translate into an absolute rule, as proposed by petitioners, requiring that dismissals on the merits always be without prejudice if one can imagine an amended complaint – wholly at odds with the claim of the original complaint – that might survive a motion to dismiss. If that were the rule, virtually no dismissal with prejudice could withstand appeal.

Here, the district court properly dismissed the complaint with prejudice in light of petitioners' failure to make any "attempt to demonstrate that absent the Match allegations, the Court in fact would have to come to the conclusion that a conspiracy existed based solely on the remaining prongs." Pet. App. at 25. Petitioners had ample opportunity to offer such an amended complaint prior to a decision on the motion to dismiss. Indeed, before deciding the motion, the district court requested guidance from the parties as to how to proceed. Petitioners could then have offered an amended complaint that addressed Section 207 or, at a minimum, indicated a willingness or intention to do so. For whatever strategic reasons, they declined to do so, and instead urged the court to decide defendants' Section 207 motion on the basis of their original theory and the amended complaint that they had proposed prior to enactment of Section 207, which asserted the same basic claim of an integrated conspiracy centered on the Match.[21]

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[19] *See, e.g.*, *James Cape & Sons, Co. v. PCC Constr. Co.*, 453 F.3d 396, 400-01 (7th Cir. 2006); *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 699 (6th Cir. 2004); *U.S. ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 242 (1st Cir. 2004); *Van Buskirk*, 325 F.3d at 91; *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 314 F.3d 541, 542 (11th Cir. 2002) (en banc); *Calderon v. Kansas Dep't of Social & Rehab. Servs.*, 181 F.3d 1180, 1186-87 (10th Cir. 1999); *Confederate Mem'l Ass'n v. Hines*, 995 F.2d 295, 299 (D.C. Cir. 1993).

[20] Similarly, *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970) (dictum) (Pet. 14), involved a union-representation case where special leniency in pleading is allowed. *Alston v. Parker*, 363 F.3d 229 (3d Cir. 2004) (Pet. 15), involved the incorrect imposition by the district court of a heightened pleading requirement.

As the Court said in *Nietzke v. Williams*, 490 U.S. 319, 329 (1989): "Under Rule 12(b)(6), a plaintiff with an arguable claim is ordinarily accorded notice of a pending motion to dismiss for failure to state a claim and an opportunity to amend the complaint before the motion is ruled upon." Petitioners had that opportunity here, and more. On the facts of this case, review by this Court is not warranted.[22]

D. Denial of Petitioners' Post-Judgment Motions

The denial of petitioners' post-judgment motions does not present an issue worthy of the Court's attention. First, the motions were time-barred under the 10-day jurisdictional deadline in Rule 59(e). In any event, the district court was well within its discretion in refusing to reopen the final judgment to allow an amended complaint, because, *inter alia*, petitioners' delay in seeking leave to amend stemmed solely from their own strategic choices.[23] Any differences in the standards applied by the circuit courts to post-judgment efforts to amend pleadings are inconsequential, and would not in any event have caused any other court to reach a different result in this case.

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[21] Petitioners had obviously drafted, but elected not to file, their 159-paragraph second amended complaint, signed by no less than 36 lawyers (Pet. App. 164-237), for it was submitted to the district court within days of entry of judgment.

[22] Indeed, as addressed further in Part D, petitioners' case would have been dismissed under virtually any standard, as they failed in their post-judgment motions to satisfy even the liberal requirements of Rule 15(a). Pet. App. 47-49.

1. A motion under Rule 59(e) must be brought within ten days of entry of judgment. Fed. R. Civ. P. 59(e). This deadline is jurisdictional, and it may not be extended. Fed. R. Civ. P. 6(b); *see Derrington-Bey v. D.C. Dep't of Corrections*, 39 F.3d 1224, 1225 (D.C. Cir. 1994); *Vargas v. Gonzalez*, 975 F.2d 916, 917 (1st Cir. 1992). Further, a Rule 59(e) motion must "specifically identify those matters which [movant] believes [the] court has overlooked and why those matters would render [the] court's prior decision erroneous." 11 Charles A. Wright *et al.*, FEDERAL PRACTICE & PROCEDURE § 2817 n.1 (2d ed. 1995).

Petitioners' initial Rule 59(e) motion raised a single ground: absent amendment of the judgment, *res judicata* would bar their efforts to assert new claims based on non-Match allegations, a result that plaintiffs argued would be manifestly unjust. JA827-28. In their reply brief -- filed more than 50 days after entry of judgment -- petitioners explicitly withdrew that ground, concluding on the basis of "defendants' response and further research" that this asserted basis for relief was in error. JA930-31 n.6. They then advanced an entirely new and different Rule 59(e) motion, one based on the Clayton Act statute of limitations and a claim that Section 207 was an "intervening" change in controlling law.

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[23] *See, e.g.*, note 21 *supra*.

That belated effort was time-barred. The ten-day requirement of Rule 59(e) is firm; circumventing the requirement by amending the motion or adding new grounds is prohibited. *See, e.g., Parisie v. Greer*, 705 F.2d 882, 892 (7th Cir. 1983) (Posner, J., concurring) (If a party could file a non-substantive post-judgment motion and add substantive grounds only later, "the 10-day limit in Rule 59(e) would be circumvented."); *RMED Int'l, Inc. v. Sloan's Supermarkets, Inc.*, 207 F. Supp. 2d 292, 294-95 n.4. (S.D.N.Y. 2002) ("[P]ermitting defendants to raise a new ground for reconsideration in a reply memorandum would allow defendants to violate the intent of Rule 59(e).").[24]

The lower courts declined to reach the jurisdictional issue (*see* Pet. App. 6-7, 46 n.1) in light of petitioners' failure to satisfy either the Rule 59(e) or Rule 15(a) standards for post-judgment relief. The jurisdictional time limit remains, however, an absolute bar to any relief sought by petitioners' post-judgment motions, and renders this case an inappropriate vehicle for further review of the rulings on those motions.

2. Furthermore, the lower courts' treatment of petitioners' post-judgment motions does not reveal any real conflict among the circuits. Petitioners overstate the distinctions between the D.C. Circuit's standard for post-judgment leave to amend and the assertedly more liberal standards of some other circuits. Decisions under Rule 59(e) and Rule 15(a) are

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[24] *See also Charles v. Daley*, 799 F.2d 343, 347-48 (7th Cir. 1986) ("The time limit would be a joke if parties could continually file new motions, preventing the judgment from becoming final. The 10 days runs from the initial judgment, so later motions are not timely."); *McCarthy v. Manson*, 554 F. Supp. 1275, 1284-85 n.9 (D. Conn. 1982) (rejecting effort to supplement original "cryptic" Rule 59(e) motion with a subsequent memorandum that laid out grounds with more specificity), *aff'd on other grounds*, 714 F.2d 234 (2d Cir. 1983).

left in all circuits to the considerable discretion of the district court; although the circuits may use different words in describing how the district court should exercise that discretion, the standards are by no means incompatible. *See, e.g.*, *Ciralsky v. CIA*, 355 F.3d 661, 673-74 (D.C. Cir. 2004) (even though district court did not abuse its discretion in declining to reopen judgment to allow an amended complaint, the cause was nonetheless remanded so that the district court could reconsider its decision); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) (reversing denial of Rule 59(e) motion where district court should have permitted opportunity to amend complaint); *Laber v. Harvey*, 438 F.3d 404, 432-33 (4th Cir. 2006) (Wilkinson, J., concurring) ("motions filed post-judgment for leave to amend a complaint are not favored under law" and highlighting the "unique" circumstances permitting post-judgment amendment in that case); *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002) ("[W]hile Rule 15 plainly embodies a liberal amendment policy, in the post-judgment context, we must also take into consideration the competing interest of protecting the finality of judgment and the expeditious termination of litigation.") (internal quotations omitted).

This is particularly true with respect to the sole issue presented by petitioners: whether it was an abuse of discretion to deny reopening of the judgment and leave to amend where petitioners had made a strategic decision to pursue a different motion to amend -- and to sit on their ultimate proposed amended complaint -- until after entry of judgment.[25] Petitioners' argument rests on the notion that they necessarily would have obtained leave to amend in other circuits, but there is no support for that premise. To the contrary, district courts in those circuits would have been well within their discretion to deny petitioners' motions. *See, e.g., Palmer v. Champion Mortg.*, 465 F.3d 24, 30-31 (1st Cir. 2006) (even under liberal Rule 15(a) pleading standards, within district court's discretion to deny leave to amend where plaintiff had no valid reason to wait until after dismissal to seek leave); *In re Adams Golf, Inc. Securities Litigation*, 381 F.3d 267, 280 (3d Cir. 2004) ("District Court did not err in refusing to open the judgment of dismissal when plaintiffs clearly relied on 'misplaced confidence' in their original pleading."); *Schiller v. Physicians Resource Group Inc.*, 342 F.3d 563, 569 (5th Cir. 2003) ("Because the Fourth Amended Complaint was not based on newly discovered evidence that was unavailable prior to the district court's judgment, we find that the district court did not abuse its discretion in denying Alpert Group's Rule 59(e) motion."); *McWhorter*, 290 F.3d at 800 ("[I]n the post-judgment context, we must be particularly mindful of . . . the movant's explanation for failing to seek leave to amend prior to the entry of judgment.").[26]

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[25] Petitioners (Pet. 25) improperly conflate that issue with the separate question of what for Rule 15(a) purposes constitutes "undue delay" in the pre-judgment context. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205 (10th Cir. 2006) (collecting cases involving pre-judgment efforts to amend pleadings).

Nothing in this Court's decision in *Foman v. Davis* suggests that the lower courts reached an incorrect result in this case. The holding of *Foman* is narrow -- leave to amend should be given absent any "apparent or declared reason" to the contrary, and a district court abuses its discretion when it denies leave to amend without explaining the basis for its action. *See Foman*, 371 U.S. at 182. *Foman* does not stand for the proposition that leave to amend must be granted automatically, or that a plaintiff's deliberate decision to delay amendment until after judgment is an invalid reason to deny leave to amend, and certainly does not preclude circuits from structuring standards for Rule 59(e) motions seeking leave to amend that are consistent with *Foman*'s narrow holding.

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[26] Both the Third and Fifth Circuit decisions cited above explicitly reference the earlier decisions of those courts relied upon by petitioners (Pet. 22-23). *See In re Adams Golf, Inc. Securities Litigation*, 381 F.3d at 280 (citing *Cureton v. Nat'l Collegiate Athletic Ass'n*, 252 F.3d 267, 272 (3d Cir. 2001)); *Schiller*, 342 F.3d at 569 (discussing *Rosenzweig v. Azurix Corp.*, 332 F.3d 854 (5th Cir. 2003)); *see also Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000) ("[W]here a party seeks to amend her complaint after entry of judgment, 'we have consistently upheld the denial of leave to amend where the party seeking to amend has not clearly established that he could not reasonably have raised the new matter prior to the trial court's merits ruling.'") (citation omitted).

Here, the D.C. Circuit examined the circumstances surrounding petitioners' failure to move to amend, and properly concluded that this failure supported the district court's sound exercise of its discretion in denying leave to reopen the judgment. Pet. App. 6-7, 44-49. In the face of enactment of Section 207 and the district court's request to the parties on how to proceed, petitioners pointed not to the possibility of a new, Match-free complaint, but instead to a previously filed proposed amended complaint that continued -- like their original complaint -- to include the Match as its centerpiece. Only after judgment did they unveil yet another proposed complaint which -- quite clearly -- had been at the ready for some time.[27] The decision of the lower courts to reject such tactics is not inconsistent with either the language or spirit of *Foman*.

In fact, *Foman* provides an additional reason why the Court's further review of this case is not warranted. After denying petitioners' Rule 59(e) motion, the district court nevertheless examined their proposed amended complaint under the liberal standards of Rule 15(a) and found that the proposed amendment would be futile. Pet. App. 47-49. That determination was an additional proper "justifying reason" for denying leave (*see Foman*, 371 U.S at 182 (futility proper ground for denying Rule 15(a) motion)), and an additional reason why there is no justification for review here.[28]

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[27] *See* note 21 *supra*.

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As the court of appeals observed: "Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program." Pet. App. 7. Thus, the only issue truly presented in this case is whether *these three petitioners*, having committed themselves -- in pleadings, representations to the court, and sworn testimony -- to a claim of a "single, overarching conspiracy" that included the Match as its core, may abruptly switch course after judgment and be allowed to pursue -- purportedly as class representatives -- a claim sharply at odds with the one to which they committed. It was not an abuse of discretion for the lower courts to answer that question in the negative. No further review is warranted.

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[28] In *Foman*, the plaintiff sought merely to add an "alternative theory of recovery" to his existing facts; the "underlying facts or circumstances relied upon" were, he argued, "a proper subject of relief," and the proposed amendment would affect only the legal theory under which those facts were presented. *See Foman*, 371 U.S. at 179, 182. By contrast, petitioners' complaint was dismissed precisely because the underlying facts and circumstances were *not* a proper subject of relief, and that fatal flaw could not be cured by amendment.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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CORPORATE DISCLOSURE STATEMENTS

1. The Accreditation Council for Graduate Medical Education ("ACGME") is an Illinois nonprofit corporation with its principal place of business in Chicago, Illinois, and its general nature and purpose is to accredit programs in graduate medical education. The undersigned counsel for ACGME certifies that, to the best of his knowledge and belief, ACGME does not have any parent companies, and no publicly-held company has any ownership interest in ACGME. Five other nonprofit entities, the Association of American Medical Colleges, the American Medical Association, the American Hospital Association, the American Board of Medical Specialties, and the Council of Medical Specialty Societies, are the members of ACGME.

2. The American Medical Association, a not-for-profit association, is the nation's largest association of physicians. The AMA, whose membership includes physicians, resident physicians and medical students, strives to promote the interests of patients and the physicians who serve them. The undersigned counsel for the American Medical Association certifies that, to the best of his knowledge and belief, no parent, subsidiary, or affiliate of the American Medical Association has any outstanding securities in the hands of the public.

3. The Association of American Medical Colleges is a nonprofit association of medical schools, teaching hospitals, and academic societies. The AAMC seeks to improve the nation's health by enhancing the effectiveness of academic medicine. The undersigned counsel of record for the Association of American Medical Colleges certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Association of

American Medical Colleges which have any outstanding securities in the hands of the public: None.

4. Barnes-Jewish Hospital is a non-profit corporation incorporated in Missouri, with its principal place of business in St. Louis, Missouri. Its activities include providing patient care, scientific research, community service and educational activities related to the care of the sick and injured in the St. Louis community. The undersigned counsel of record for Barnes-Jewish Hospital certifies that, to the best of his knowledge and belief, no parent companies, subsidiaries or affiliates of Barnes-Jewish Hospital have any outstanding securities in the hands of the public. Barnes-Jewish Hospital has issued tax exempt bonds through the Missouri Health and Educational Facilities Authority in the past.

5. The undersigned counsel of record for Defendant-Appellee Baylor College of Medicine hereby certifies that, to the best of his knowledge and belief, Baylor College of Medicine is a Texas non-profit public benefit corporation without corporate parent and no publicly-held company has any ownership interest in Baylor College of Medicine. Baylor College of Medicine operates an educational institution in Houston, Texas, that grants various degrees in medicine and conducts graduate medical education training programs for resident physicians.

6. Beth Israel Medical Center is a non-profit corporation organized under the laws of New York with its principal place of business in New York, New York. Beth Israel Medical Center is a full-service tertiary teaching hospital that serves individuals and families from New York City and its environs. The undersigned counsel of record for Beth Israel Medical Center certifies to the best of his knowledge and belief that Continuum Health Partners, Inc. is

the only parent company of Beth Israel Medical Center, and that no publicly-held company has a 10% or greater ownership interest in Beth Israel Medical Center.

7. The undersigned counsel for Beth Israel Deaconess Medical Center, Boston Medical Center, Rhode Island Hospital, Thomas Jefferson University Hospital, and Yale-New Haven Hospital certify that, to the best of their knowledge and belief, no parent, subsidiary or affiliate of the defendants-appellees herein listed has any outstanding securities in the hands of the public. BIDMC's sole Member is CareGroup, Inc., a Massachusetts non-profit charitable corporation. Boston Medical Center, and CareGroup and certain of its affiliates, have issued tax-exempt bonds through the Massachusetts Health and Educational Facilities Authority in the past. Rhode Island Hospital has a sole corporate member, Lifespan Corporation; Lifespan Corporation is also the sole corporate member of The Miriam Hospital and the respective fund-raising entities for each hospital, namely, Rhode Island Hospital Foundation and The Miriam Hospital Foundation. The two hospitals and the two foundations comprise a single Obligated Group which has, from time to time, issued tax-exempt bonds through the Rhode Island Health and Education Building Corporation.

8. Cedars-Sinai Medical Center is a nonprofit, public benefit corporation and acute care hospital located in Los Angeles, California. Among its missions, Cedars-Sinai Medical Center educates medical residents. The undersigned counsel of record for Cedars-Sinai Medical Center certifies that to the best of his knowledge and belief, Cedars-Sinai Medical Center has no parent companies, subsidiaries or affiliates which have any outstanding securities in the hands of the public. Cedars-Sinai has issued tax exempt bonds through the California Health Facilities Financing Authority and other California state Authorities in the past.

9. The Cleveland Clinic Foundation is a not-for-profit corporation in Cleveland, Ohio organized under the law of Ohio and based in Ohio. Among its missions, The Cleveland Clinic Foundation educates medical residents. The undersigned counsel of record for The Cleveland Clinic Foundation certify that, to the best of their knowledge and belief, The Cleveland Clinic Foundation has no parent companies, subsidiaries or affiliates which have any outstanding securities in the hands of the public.

10. Duke University Health System, Inc., is a not-for-profit health care system committed to excellence, innovation and leadership in meeting the health care needs of the people it serves, improving community health, and fostering the very best medical education and biomedical research. The undersigned counsel of record for Duke University Health System, Inc., certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Duke University Health System which have any outstanding securities in the hands of the public: None.

11. Emory University is a private, non-sectarian university incorporated under the laws of the State of Georgia with its principal place of business in Atlanta, Georgia. The undersigned counsel of record for Emory University certifies that to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Emory University which have any outstanding securities in the hands of the public: None.

12. The George Washington University is a private, non-sectarian university consisting of 19,000 students in nine schools. The George Washington University is a non-profit corporation chartered by Congress, with its principal place of business in Washington, D.C. The undersigned counsel of

record for The George Washington University certifies that to the best of his knowledge and belief there are no parent companies or any publicly held company that has a 10% or greater ownership interest in The George Washington University.

13. The undersigned counsel for Henry Ford Health System and William Beaumont Hospital certify that, to the best of their knowledge and belief, no parent, subsidiary or affiliate of Henry Ford Health System or William Beaumont Hospital has any outstanding securities in the hands of the public. The general nature and purpose of Henry Ford Health System is operation of a full-service teaching hospital in Detroit, Michigan. The general nature and purpose of William Beaumont Hospital is operation of a full-service teaching hospital in Royal Oak, Michigan.

14. The undersigned counsel for the Massachusetts General Hospital hereby state that the non-profit General Hospital Corporation d/b/a Massachusetts General Hospital has as its sole member The Massachusetts General Hospital corporation, which in turn has as its sole member Partners Healthcare System, Inc. The general nature and purpose of the Massachusetts General Hospital is operation of a full-service teaching hospital in Boston, MA.

15. The undersigned counsel for the McGaw Medical Center of Northwestern University ("McGaw Medical Center") state that it is an Illinois nonprofit corporation, and that its general nature and purpose is to encourage joint planning and improvement in resource allocation and utilization relating to graduate medical education, research and other community based activities. McGaw Medical Center is comprised of the following parent companies: Evanston Northwestern Healthcare, Children's Memorial Hospital, Northwestern Memorial Hospital, Rehabilitation

Institute of Chicago, Northwestern University, and VA Chicago Health Care System.

16. MedStar Georgetown Medical Center, Inc. (incorrectly identified in Plaintiffs' Complaints as MedStar Georgetown Hospital Medical Center, Inc.) and MedStar Health, Inc. are membership corporations, incorporated in the District of Columbia and Maryland, respectively, engaged in, among other activities, the provision of patient care and graduate medical education and training. The undersigned counsel of record for MedStar Georgetown Medical Center, Inc. and MedStar Health, Inc., certifies that to the best of his knowledge and belief there are no parent companies, subsidiaries or affiliates of MedStar Georgetown Medical Center, Inc. or MedStar Health, Inc. which have any outstanding securities in the hands of the public.

17. Mount Sinai School of Medicine of New York University is one of the world's foremost centers for medical and scientific training. The School provides undergraduate medical education to students on its campus in New York City and sponsors graduate medical education programs at 13 hospitals in the New York metropolitan area. Mount Sinai School of Medicine has been affiliated with New York University since July 1999. The undersigned counsel of record for Respondent Mount Sinai School of Medicine of New York University certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of Mount Sinai School of Medicine of New York University which have any outstanding securities in the hands of the public: None.

18. The National Resident Matching Program ("NRMP") is an Illinois not-for-profit corporation with its principal place of business in Washington, D.C. The NRMP does not have any parent companies. Five medical/medical

education organizations and four medical student organizations nominate candidates for election to the NRMP's board of directors but do not elect board members. Those organizations are the American Board of Medical Specialties, the American Medical Association, the Association of American Medical Colleges, the American Hospital Association, the Council of Medical Specialty Societies, the Association of American Medical Colleges Organization of Student Representatives, the American Medical Student Association, the Medical Student Section of the American Medical Association, and the Consortium of Medical Student Organizations.

19. The New York and Presbyterian Hospital ("New York-Presbyterian") operates full service teaching hospitals in New York City. The undersigned counsel of record for New York-Presbyterian certifies that to the best of his knowledge and belief, neither New York-Presbyterian, nor any parent companies, subsidiaries or affiliates have any outstanding securities in the hands of the public.

20. Rush University Medical Center, formerly known as Rush-Presbyterian-St. Luke's Medical Center, is a nonprofit, independent healthcare organization located in Chicago, Illinois. Among its missions, Rush educates medical residents. The undersigned counsel for Rush University Medical Center certify that to the best of their knowledge and belief there are no parent companies or any publicly held company that has a 10% or greater ownership interest in Rush University Medical Center.

21. Saint Louis University is a Missouri pro forma corporation formed under the Missouri Revised Statutes, Chapter 352. Among its educational missions, Saint Louis University sponsors a graduate medical education program. The undersigned counsel of record for Saint Louis University

certifies that to the best of his knowledge and belief, Saint Louis University has no parent companies, subsidiaries or affiliates which have any outstanding securities in the hands of the public. Saint Louis University has issued tax exempt bonds through the Missouri Health and Educational Facilities Authority in the past.

22. Stanford Hospital & Clinics is a non-profit corporation incorporated in California, with its principal place of business in Palo Alto, California. Its activities include providing patient care, community service and education related to the care of the sick and injured in the San Francisco Bay Area. The undersigned counsel of record for Stanford Hospital & Clinics certifies that to the best of his knowledge and belief Stanford Hospital & Clinics has no parent companies, subsidiaries or affiliates that have any outstanding securities in the hands of the public.

23. Strong Memorial Hospital of the University of Rochester is an educational non-profit corporation organized under the laws of New York with its principal place of business in Rochester, New York. Its activities include providing a comprehensive range of general and highly specialized patient care services to the sick and injured. The undersigned counsel of record for Strong Memorial Hospital of the University of Rochester certifies that to the best of his knowledge and belief, there are no parent companies or any publicly held company that has a 10% or greater ownership interest in Strong Memorial Hospital of the University of Rochester.

24. Tulane University, which is formally known as the Administrators of the Tulane Educational Fund, is a private, non-sectarian university consisting of 11 academic divisions and over 12,000 students. Tulane University is an educational non-profit corporation organized under the laws

of the State of Louisiana with its principal place of business in New Orleans, Louisiana. The undersigned counsel of record for the Administrators of the Tulane Educational Fund certifies that to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of the Administrators of the Tulane Educational Fund which have any outstanding securities in the hands of the public: None.

25. University Hospitals of Cleveland is a nonprofit corporation incorporated in the State of Ohio. Its activities include providing patient care, conducting scientific research, and providing medical education and training in its northeast Ohio community. The undersigned counsel of record for Defendant University Hospitals of Cleveland certifies that, to the best of his knowledge and belief, the following are parent companies, subsidiaries or affiliates of University Hospitals of Cleveland which have outstanding securities (issued on their behalf by the Counties of Cuyahoga and Geauga, Ohio) in the hands of the public:

University Hospitals Health System, Inc.
University Hospitals of Cleveland
University Hospitals Health System - Heather Hill, Inc.
University Hospitals Health System - Heather Hill Rehabilitation Hospital, Inc.
Geauga Hospital Association, Inc.
UHHSICSAHS- Cuyahoga, Inc. and CSAHSLJHHS - Canton, Inc.
Southwest General Health Center
UHHS Bedford Medical Center.

③

No. 06-567

Supreme Court, U.S.
FILED
DEC - 4 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

PAUL JUNG, M.D., *ET AL.*

Petitioners,

v.

ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *ET AL.*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF SUPPORTING PETITION FOR A WRIT OF CERTIORARI

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STATUTE

15 U.S.C. § 37b ("Section 207") 5

Petitioners Paul Jung, M.D.; Denise Greene, M.D.; and Luis Llerena, M.D. ("Residents") submit this reply brief pursuant to Supreme Court Rule 15.6 to address new points raised by Respondents in their Brief in Opposition ("Opp.").

1. Respondents Do Not Dispute Splits Of Circuit Authority On Important Procedural Issues. Respondents' brief primarily discusses the correctness of the ruling in this case, but that is largely an issue for another day. The issue today is whether there are important federal questions and splits of circuit authority that warrant the review of this Court, and the answer is "yes." Respondents suggest that this Court wait for some undefined "better vehicle to address any certiorari-worthy questions. . . ." Opp. 19, but any delay is a disservice to courts and parties nationwide and unfair to the Residents here.

It is, of course, important to preserve district court discretion on certain procedural matters, Opp. 9, 10, 18-20, 22, 24-27, but Respondents overplay that need and fail to recognize the equal importance of parties knowing exactly what is required of them under the federal procedural rules, and that is impossible without clearly articulated, uniform, and consistently applied standards. Historically, this Court has been interested in uniform application of federal procedural rules in particular. *See Hanna v. Plumer*, 380 U.S. 460, 472 (1965); *United States v. F. & M. Schaefer Brewing Co.*, 356 U.S. 227, 230-31 (1958).

Respondents do not dispute the circuit split on the standard for dismissal of a complaint with prejudice, specifically that (a) ten circuits allow such dismissal only where no amended complaint could be offered that would meet the Rule 15(a) standard for amendment, and (b) the D.C. and Ninth Circuits also allow dismissal with prejudice where the allegations of any amended complaint would be "inconsistent" with those of the preceding complaint. *Compare* Pet. 13-20, *with* Opp. 18-21 (ignoring all 21 D.C. and Ninth Circuit decisions cited by the Residents). This troublesome split exists whether or not this Court's ruling in *Foman v. Davis*, 371 U.S. 178 (1962), is the basis for the majority rule, Opp. 19, although *Foman* clearly is the basis. Importantly, Respondents never identify the standard for dismissal with prejudice, Opp. 18-21, and may believe that to be without a standard is to be without a conflict, but it is also to be in need of a standard.

Respondents similarly ignore the circuit split on the standard for post-judgment repleading of the complaint where it has been dismissed *on the pleadings*, specifically that (a) eight circuits apply the liberal standard of Rule 15(a), and (b) four circuits, including the D.C. Circuit, apply the "more stringent" standard of Rule 59(e). *Compare* Pet. 20-26, *with* Opp. 23-27. Respondents not only fail to identify any standard, but say more directly that there is *none*. Opp. 24 ("the circuits may use different words," but each allows "considerable discretion"). Once again, to be without a standard is only to be in need of one, it does not defeat the need for this Court's guidance.

Respondents' cited authorities do not cure the circuit split. The split remains even if the D.C. Circuit on two occasions may have reached a more liberal result than usual under its stringent Rule 59(e) standard. Opp. 24, citing *Ciralsky v. CIA*, 355 F.3d 661, 673-74 (D.C. Cir. 2004); *Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996). Likewise, the circuit split exists and should be resolved even if the Sixth Circuit on one occasion may have reached a more conservative result than usual under its liberal Rule 15(a) standard. Opp. 24, citing *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002). The split is also not obviated by four courts considering the time of dismissal in assessing the "undue delay" factor of their Rule 15(a) standard. Opp. 25, citing *Palmer v. Champion Mortgage*, 465 F.3d 24, 30-31 (1st Cir. 2006); *In re Adams Golf, Inc. Sec. Litig.*, 381 F.3d 267, 280 (3d Cir. 2004); *Schiller v. Physicians Res. Group Inc.*, 342 F.3d 563, 569 (5th Cir. 2003); and *McWhorter*, 290 F.3d at 800. Furthermore, *Laber v. Harvey*, 438 F.3d 404, 432-33 (4th Cir. 2004), and *Vielma v. Eureka Co.*, 218 F.3d 458, 468 (5th Cir. 2000), involve repleading of a complaint after summary judgment, not after dismissal *on the pleadings*, which is the subject of this petition. Opp. 24. *See* Pet. i, 22.

Indeed, Respondents' brief does more to *demonstrate* the need for this Court's guidance than to refute it. Respondents jump out of the frying pan and into the fire by drawing a parallel between this case and the Rule 15(a) "undue delay" cases, Opp. 25, because the circuits are split on how to define that term. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1205-06 n.15 (10th Cir. 2006) (discussing split). Respondents contend that this split is limited to "the pre-judgment context," Opp. 24 n.25, but that unsatisfying distinction begs the fundamental questions of this petition, and is also wrong. *See, e.g., Benzon v. Morgan Stanley Distrib., Inc.,* 420 F.3d 598, 613 (6th Cir. 2005) (applying Rule 15(a) standard in post-judgment context and citing *Foman v. Davis*, 371 U.S. 178 (1962)).

Respondents similarly illustrate more conflict than harmony among the circuits by arguing that a district court may deny leave to replead the complaint if a plaintiff does not ask for it, a question on which there is also a split of circuit authority. Opp. 20-21, 24-26. Respondents cite cases from the First, Second, Sixth, Seventh, Tenth, Eleventh, and D.C. Circuits. Opp. 20 n.19. But other circuits, including the D.C. Circuit recently, disagree, and do not allow dismissal with prejudice simply for lack of a pre-dismissal request to amend. *See, e.g., Belizan v. Hershon,* 434 F.3d 579, 584 (D.C. Cir. 2006); *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000); *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995). Similarly, this Court in *Foman* reversed the district court for denying leave to amend even though the plaintiff had not moved to amend pre-judgment. 371 U.S. at 182.

Respondents also harm their cause by suggesting that courts misinterpret and misapply this Court's seminal ruling in *Foman*, 371 U.S. at 182, which established the modern standard for leave to amend. Respondents argue that the *Foman* standard does not apply to dismissals with prejudice, Opp. 19, but several courts disagree as reflected in cases that Respondents cite on the very next page of their brief. Opp. 20 n.19, citing *James Cape & Sons, Co. v. PCC Constr. Co.*, 453 F.3d 396, 400-01 (7th Cir. 2006) (reviewing dismissal with prejudice and citing *Foman* in that regard); *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 698 (6th Cir. 2004) (same). Few courts likely share Respondents' reading of *Foman* that "a district court abuses its discretion [only] when it denies leave to amend without explaining the basis for its action," Opp. 26, especially because *Foman* specifically lists the preconditions of undue delay, bad faith or dilatory motive, repeated failure to cure by amendment, undue prejudice, and futility. 371 U.S. at 182.

2. The Savings Clause Applies Because The Residents Pleaded A Price-Fixing Claim. Respondents argue that the Residents' price-fixing claims are not "traditional," Opp. 2 (appearing, incorrectly, to quote the Residents themselves), and thus not preserved by the savings clause, Opp. 12. The Residents' claim clearly is a price-fixing claim. Respondents themselves admit that it "allege[s] a long-standing conspiracy that had the effect of depressing the level of stipends received by medical residents . . . ." Opp. 2. Likewise, the district court ruled that the Residents "alleged a common agreement . . . that has the purpose and effect of fixing, artificially depressing, standardizing and stabilizing resident physician compensation . . . ." Pet. App. 150-51.

Respondents and the district court precisely describe price-fixing. "The Court has repeatedly said that the essence of a conspiracy is 'an agreement to commit an unlawful act.'" *U.S. v. Jimenez Recio*, 537 U.S. 270, 274 (2003). "[R]aising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*." *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). "[I]t [is not] important that the prices paid by the combination were not fixed in the sense that they were uniform and inflexible . . . They are fixed because they are agreed upon." *Id.* Respondents futilely attempt to re-label the Residents' claims based on the *mechanisms* used, Opp. 2-3; 12-13, but "[a]s we have indicated, the machinery employed by a combination for price-fixing is immaterial." *Socony-Vacuum*, 310 U.S. at 223.

The savings clause preserves claims alleging any agreement to "fix the amount" of resident wages. Section 207(b)(3). "Congress presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed." *Beck v. Prupis*, 529 U.S. 494, 501 (2000). Respondents wrongly interpret "fix the amount" narrowly, and wrongly contend that the savings clause "does not preserve all antitrust claims that allege some *impact* on resident stipends . . . ." Opp. 12 (emphasis in original). Under *Beck* and *Socony-Vacuum*, the savings clause certainly encompasses the Residents' claim, which is a price-fixing claim. Respondents are backpedaling now, but they told Congress that the Match had no impact on resident compensation and the savings clause holds them to it.

3. Neither Lower Court Here Decided Rule 15(a) Issues, Conflicting With The Majority Circuit Standards. Respondents incorrectly contend that the district court denied the Residents' post-judgment motion not only under Rule 59(e), but "in the alternative" under Rule 15(a). Opp. 8. To the contrary, the court stated that Rule 15(a) issues could not be reached "unless the plaintiff first satisfies Rule 59(e)'s more stringent standard." Pet. App. 45. It found the Rule 59(e) standard unsatisfied, *id.* at 45, solely because the Residents did not move to amend their complaint pre-dismissal. *Id.* at 46. "Plaintiffs' [Rule 15(a)] motion to amend their complaint therefore is moot." *Id.* at 47. For its part, the D.C. Circuit expressly ruled that it "need not reach the Rule 15(a) issue." Pet. App. 7. The absence of any Rule 15(a) ruling by either lower court puts them in direct conflict with the majority of circuits, which hold that both dismissal with prejudice and post-judgment leave to replead are *controlled* by Rule 15(a) issues.

The district court's *dicta* in a single paragraph regarding "problems," *dicta* not cited or endorsed by the D.C. Circuit, falls far short of any reasonable futility analysis of the amended complaint, Pet. App. 48-49, as demonstrated by the scores of pages that were necessary to decide those same issues earlier when the district court upheld the original claim. Pet. App. 55-87, 115-149.

4. The Residents' Post-Judgment Motion For Leave To Amend Was Timely. Respondents wrongly assert that the Residents' Rule 59(e) motion was untimely. Opp. 22-23. As a threshold matter, the lower courts did not "decline to reach" Respondents' argument, Opp. 23; they necessarily rejected it by deciding the merits of the motion.

The time limit is jurisdictional and untimeliness is not only "an absolute bar to any relief," Opp. 23, but also an absolute bar to "review[ing] the judgment" at all. *Derrington-Bey v. District of Columbia Dep't of Corrections*, 39 F.3d 1224, 1226 (D.C. Cir. 1994).

Moreover, Respondents admit that the Residents filed their motion to alter or amend judgment within the ten-day period, Opp. 7, and that act conferred jurisdiction on the district court to alter or amend its judgment on any ground. *See E.E.O.C. v. United Ass'n of Journeymen and Apprentices of the Plumbing and Pipefitting Indus. of the U.S. and Canada, Local No. 120*, 235 F.3d 244, 250 (6th Cir. 2000) ("a judge may enlarge the issues to be considered in acting on a timely motion under Rule 59(e)," quotations omitted). It is irrelevant that the opening brief focused on the manifest injustice of claim preclusion via the statute of limitations while the reply focused on it via *res judicata*, and the two are not "entirely different." Opp. 22.

5. Respondents Overplay Their Incorrect "Waiver" Theme. Respondents energetically remind the Court that the Residents "rested on" their original claim, and argue that this waived any ability to amend after it was dismissed. Opp. 4-5, 7, 9, 10, 19, 20, 21, 22, 26, 27.[1] Respondents cite only cases upholding dismissal with prejudice where a plaintiff *never* moved to amend, either pre- or post-judgment, and thus improperly raised the issue for the first time on appeal, Opp. 20 n.19. Here, the Residents moved to amend post-judgment, as they were invited to do no less than three times in Respondents' briefs on the motion to dismiss.

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[1] Another aspect to this tempest in a teapot, attached hereto as R-App. 1-7, is the entirely benign joint submission to the district court referenced by Respondents. Opp. 5 n.3.

Respondents' lack of authority supporting their waiver theory is unsurprising given that, when they filed their motion to dismiss, nothing in the federal procedural rules limited the Residents' choices only to (a) the Scylla of effectively conceding Respondents' motion to dismiss by abandoning the original claim and asserting a scaled-down claim without any test of the new Match legislation, or (b) the Charybdis of opposing the motion to dismiss at the risk of losing their entire action and any ability to assert a scaled-down claim omitting Match allegations. "Resting on" or "standing on" a complaint is a concept wholly inapplicable here: after dismissal *without prejudice*, a plaintiff may elect to formally decline to amend ("stand on") a complaint in order to obtain a final judgment and proceed to appeal. *See, e.g., Jung v. K. & D. Mining Co.,* 356 U.S. 335, 336 (1958).

Contrary to Respondents' suggestion, a pre-dismissal motion to amend would not have mooted the Respondents' pending motion to dismiss and would not have saved the district court any effort. The amended complaint did not *abandon* the original claim, but pleaded two claims, *see* Pet. App. 228-31, one being the original claim and the other being a new claim virtually identical to the original claim but for omitting the Match as a plus factor. *See* amended complaint, Pet. App. 169 ("Count II simply repleads the claim contained in the Plaintiffs' original complaint in order to preserve it for appeal"). The Residents' motion to amend suggested that the district court grant the motion to amend, re-dismiss the original claim and certify it for interlocutory appeal as to whether the legislation had successfully immunized the Match, and allow the parties to continue litigating the bulk of the case on the scaled-down claim during that appeal. This case had already been pending for nearly two years, yet merits discovery had not even begun. If that was the wrong approach, it did not warrant dismissal with prejudice of the entire action.

6. Denial Of Leave To Amend Unjustly Extinguishes Thousands Of Claims. Respondents erroneously contend that only the named plaintiffs in this proposed class action are deprived of their claims by the rulings here, Opp. 10, 27, a factor pivotal to manifest injustice. While the D.C. Circuit was also led to believe this, it is simply incorrect. *See* Pet. App. 7 ("Nothing in the District Court's disposition or in ours precludes future plaintiffs from pursuing price-fixing claims against those defendants or related individuals or entities that are unrelated to the Matching Program.")

Regrettably, thousands of additional residents are deprived of claims. If allowed in this action, the amended claim would have related back to the original filing date of May 7, 2002, and under the four-year statute of limitations all persons employed as resident physicians from May 7, 1998 forward would have had the option to exercise their legal rights if a class were certified. Fed. R. Civ. P. 15(c). However, because a new action must now be filed, the amended claim will not relate back to the original filing date, and persons who completed their residency before late 2002 (*i.e.*, four years prior to a new action's filing date) have, like the three named plaintiff Residents, unjustly lost their claims.

7. The Amended Complaint States A Proper Claim. Like the lower courts in their rulings, Respondents in their brief do not reasonably explain why the proposed amended complaint, Pet. App. 164-237, fails to state a claim within its four corners. It does, and here the procedural rules did not "work as they should" to allow it to "be carried to an adjudication on the merits." *Surowitz v. Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966).

Respectfully submitted,

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December 4, 2006

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PAUL JUNG, M.D., *et al.*, Plaintiffs, v. ASSOCIATION OF AMERICAN MEDICAL COLLEGES, *et al.*, Defendants.	Civil Action No. 02-0873 (PLF)

ORDER

(Filed May 19, 2004)

This matter is before the Court for consideration of the parties' Consent Motion to Extend Certain Briefing Deadlines. Also filed with the Court are, *inter alia,* plaintiffs' Amended Motion to Certify the Class, Defendant National Resident Matching Program's Motion to Stay Proceedings Pending Appeal; various defendants' Motion for Certification for Interlocutory Appeal; certain defendants' Motion to Stay Proceedings Pending Appeal; Plaintiffs' Motion for Leave to File First Amended Complaint; certain Defendants' Motion for Judgment on the Pleadings; and certain Defendants' Motion for Reconsideration. These motions are in various stages of briefing. The Court will grant the parties' consent motion, but also requests guidance from the parties as to the most appropriate course of action the Court should take in considering these various motions. Specifically, in view of the subject matter of the motion for reconsideration and the motion for judgment on the pleadings, is it appropriate to deal first with those motions or first with the motions to stay and for an interlocutory appeal?

Accordingly, it is hereby

ORDERED that the Consent Motion to Extend Certain Briefing Deadlines [264-1] is GRANTED; it is

FURTHER ORDERED plaintiffs shall file their oppositions to Defendants' Motion for Judgment on the Pleadings and to Defendants' Motion for Reconsideration on or before June 4, 2004; and defendants shall file their reply briefs, if any, on or before June 18, 2004; it is

FURTHER ORDERED that defendants shall file their opposition to plaintiffs' Motion to Certify a Class on or before July 30, 2004; and it is

FURTHER ORDERED that on or before June 1, 2004, the parties shall file a joint report indicating the parties' positions with respect to the most appropriate course of action the Court should take in considering the various pending motions.

SO ORDERED.

/s/ Paul L. Friedman
PAUL L. FRIEDMAN
United States District Judge

DATE: 5/17/04

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE: RESIDENT PHYSICIANS ANTITRUST LITIGATION	Civil Action No. 02-0873 (PLF) (JMF)
This Document Relates To: All Actions	

PARTIES' JOINT REPORT REGARDING THE DISPOSITION OF PENDING MOTIONS

(Filed June 1, 2004)

Pursuant to the Court's May 17, 2004 Order, the parties respectfully submit this joint report indicating their positions with respect to the most appropriate course of action the Court should take in considering the various pending motions.[1]

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[1] This joint report is filed on behalf of all plaintiffs and on behalf of those defendants currently before the Court, namely the Accreditation Council for Graduate Medical Education, the Administrators of the Tulane Educational Fund, the Association of American Medical Colleges, Barnes-Jewish Hospital, Baylor College of Medicine, Beth Israel Deaconess Medical Center, Beth Israel Medical Center, Boston Medical Center, Cedars-Sinai Medical Center, Cleveland Clinic Foundation, Duke University Health System, Emory University, The George Washington University, Henry Ford Health System, Massachusetts General Hospital, McGaw Medical Center of Northwestern University, MedStar Health, Inc., MedStar-Georgetown Medical Center, Inc., Mount Sinai School of Medicine of New York University, New York and Presbyterian Hospital, Rhode Island Hospital, Rush-Presbyterian-St. Luke's Medical Center, Saint Louis University, Stanford Hospital & Clinics, Strong Memorial Hospital of the University of Rochester, Thomas Jefferson University Hospital, University Hospitals of Cleveland, Inc., William Beaumont Hospital, and Yale-New Haven Hospital.

It is the parties' understanding that the following motions are currently pending before the Court:

1. Consent motion for entry of stipulated order on experts' discovery (Dkt. 201).
2. Plaintiffs' motion for class certification, as amended (Dkt. 203, 205, 238) (not fully briefed).
3. Defendants' motion to compel class discovery (Dkt. 223) (pending before Magistrate Judge Facciola).
4. Plaintiffs' motion to amend or correct order staying of class discovery (Dkt. 234) (pending before Magistrate Judge Facciola).
5. Plaintiffs' motion for protective order (Dkt. 235) (pending before Magistrate Judge Facciola).
6. NRMP's motion to stay proceedings pending appeal (Dkt. 239).
7. Certain defendants' motion for certificate of appealability (Dkt. 241).
8. Defendants' motion to stay proceedings pending appeal (Dkt. 243).
9. Plaintiffs' motion to amend the complaint (Dkt. 248).
10. Defendants' motion for judgment on the pleadings (Dkt. 259) (not fully briefed).
11. Certain defendants' motion to reconsider the Rule 12(b)(2) jurisdiction ruling (Dkt. 260) (not fully briefed).[2]

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[2] In addition, a consent motion to extend certain briefing schedules (for motions numbered 4, 10, and 11 above) is being filed herewith. All parties support the early consideration of that consent motion.

The parties are not in agreement on the most appropriate course of action. Accordingly, they set forth their respective positions below.

A. Plaintiffs' Position

Plaintiffs propose that the Court consider and rule on the motions in the following order. Among other things, plaintiffs view a ruling on their motion to amend the complaint (no. 9) as prerequisite to any rulings on defendants' dispositive motions (nos. 10 and 11) because plaintiffs' new allegations are relevant to issues raised by the latter (e.g. jurisdiction). Plaintiffs do not agree that rulings on the dispositive motions might moot the motion to amend, especially since the new allegations largely concern defendants' exchange of wage information rather than the matching program that is the subject of the legislation.

a. Plaintiffs' motion to amend the complaint (no. 9)

b. Defendants' dispositive motions based on legislation (nos. 10 and 11)

c. Motions relating to NRMP's arbitration appeal (nos. 6, 7 and 8)

d. Motions relating to class certification discovery (nos. 1, 3, 4 and 5)

e. Plaintiffs' motion for class certification (no. 2).

B. Defendants' Position

Defendants propose that the Court first address the dispositive motions based on the legislation (nos. 10 & 11).

If those motions are granted, plaintiffs' motion to amend the complaint (no. 9) could then be dismissed as moot, given that the proposed amended complaint does not raise new allegations that would bear on the applicability of the legislation. (Defendants object to plaintiffs' proposal that the motion to amend be decided first, followed immediately by consideration of the legislative motions. This is because, if the motion to amend is granted, plaintiffs may claim that the "one motion rule" (*see* Fed. R. Civ. P. 12(g) & (h)) results in defendants' having waived other defenses that would otherwise be applicable to the amended complaint.)

With respect to the other pending motions, defendants' position is that any consideration of the manner or order of their disposition should await the Court's ruling on the legislative motions (nos. 10 & 11).

Respectfully submitted,

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On behalf of defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 1st of June, 2004, a copy of the foregoing was served on counsel of record pursuant to the Court's ECF system.

/s/ Derek Ludwin
Derek Ludwin